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OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED AND AN INDEX.

By FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 94,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1883, NOT REPORTED IN VOLS. 91, 92 AND 93.

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JUDGES

OF THE

SUPREME COURT

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE V. HOWK. *†

HON. BYRON K. ELLIOTT. ‡

HON. ALLEN ZOLLARS. †

HON. EDWIN P. HAMMOND. §

HON. WILLIAM E. NIBLACK. †

*Chief Justice at the November Term, 1883.

†Term of office commenced January 1st, 1883.

‡Term of office commenced January 3d, 1881.

§Appointed May 14th, 1883, to succeed Hon. WILLIAM A. WOODS.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.‡

HON. WALPOLE G. COLERICK.§

* Chief Commissioner.
† Appointed April 27th, 1881.
‡ Appointed May 29th, 1882.
§ Appointed November 9th, 1883.

OFFICERS

OF THE

SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1883, IN THE SIXTY-EIGHTH YEAR OF THE STATE.

No. 10,727.

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137 492

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154 238

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170 395

SCOTT ET AL. *v.* HANSHEER, TREASURER, ET AL.

RAILROAD.—*Aid Appropriation.—Complaint to Enjoin Tax.—Objections.—Separate Clauses.—Demurrer.*—In a suit to enjoin the collection of a township tax levied for an appropriation to a railroad company to aid in the construction of its road, it is good pleading to state in a single paragraph of complaint all the facts leading to and resulting in the levy of the tax, and then to set forth in the same paragraph, but in separately numbered clauses or specifications, each several ground of objection to the validity of the tax, and the sufficiency of each clause or specification may be tested by a demurrer for the want of facts.

SAME.—*Sufficiency of Petition.—Ambiguity or Uncertainty.*—Mere ambiguity or uncertainty in the phraseology of the petition for an appropriation will not vitiate or avoid the levy of the tax, when it is apparent that no interested party was or could be misled or deceived thereby, or could misapprehend the intention and purpose of the petitioners.

SAME.—*Incorporated City Within Township Limits.—Part of Township.—City Voters are Township Voters.—City and Township Taxables.*—For the purpose of a township tax in aid of a railroad, an incorporated city within the limits of a civil township is a part of such township, the qualified voters of the city are voters of the township, and the taxable property within the city is also taxable property within the township and is subject to taxation for township purposes.

SAME.—*Consolidated Company.*—Where an appropriation has been lawfully made by a township to a railroad company to aid in the construction of its road, the company acquires such a right to and interest in the appropriation, and the obligation of the township to pay the same, as, upon its subsequent consolidation with another railroad corporation, will pass to and vest in the consolidated company.

From the Laporte Circuit Court.

J. A. S. Mitchell, W. B. Biddle and *C. H. Truesdale,* for appellants.

J. Bradley and *J. H. Bradley,* for appellees.

HOWK, C. J.—We take the following summary of the facts alleged in the appellants' complaint, in this case, from the briefs of appellees' counsel:

The appellants allege, in their complaint, that they are the owners of real or personal property in Center township or in the city of Laporte, which is an incorporated city within said township, which is subject to taxation within said township, and which is assessed for taxation on the tax duplicate for the year 1882; that on the 21st day of June, 1881, a petition, signed by ninety-three persons who claim to be freeholders of said Center township, was presented to the board of commissioners of Laporte county, asking said board to make an appropriation of the sum of $33,500 to aid the Indiana and Michigan Railroad Company, a corporation organized under the laws of the State of Indiana, in constructing a railroad through said township and city, described in the petition as "commencing on the line between the States of Indiana and Michigan, at a point on the north line of Springfield township in Laporte county aforesaid, in the direction of the town of New Buffalo in the State of Michigan, running thence in a southerly direction through the townships of Springfield and Center to and through the city of Laporte, and thence in a southwesterly direction to LaCrosse in the southwest part of said county of Laporte," and that said proposed appropriation be levied by taxation on and from said Center township and donated to said company; and there-

upon the said board of commissioners made an order that the polls be opened at the several voting places in said Center township on the 25th day of July, 1881, and that the votes of the voters of said township be taken upon the subject of making the appropriation prayed for in the said petition; that in pursuance of said order the auditor of said county caused notice to be given by publication in the Herald-Chronicle, a weekly newspaper of general circulation in said county, and published therein for four consecutive weeks before the 25th day of July aforesaid, and by causing printed hand-bills to be posted in ten public places in said township, by the sheriff of said county, three week prior to said 25th day of July aforesaid, which notice is as follows:

"ELECTION NOTICE.

"Notice is hereby given to the qualified voters of Center township, in Laporte county, in the State of Indiana, that by order of the board of commissioners of said county of Laporte, made at the regular session in June, 1881, of the said board, the polls will be opened on Monday, July 25th, 1881, at the usual places of voting in the several precincts in said township, to take the votes of the legal voters of said township on the subject of said township aiding in the construction of the railroad of the Indiana and Michigan Railroad Company through said Center township and the city of Laporte, by the appropriation by said township of the sum of $33,500 and donating the same to the said railroad company, at least one-half of said amount to be levied by a special tax on the duplicate for the year 1882, and the residue thereof by a special tax on the duplicate for the year 1883.

"The polls at the several voting places to be opened at the same hour, and the election to be conducted by the same officers and governed by the same rules, as are provided by law for the holding and conducting of State and county elections.

"EDWARD J. CHURCH, Auditor Laporte County."

It is further alleged in the complaint that on the day

named in said order and notice the polls were opened at the several voting places in the said township and in the said city of Laporte, and the votes of the legal voters of said township and city were taken on the subject of an appropriation by said township of the sum of thirty-three thousand five hundred dollars, and donating the same to the Indiana and Michigan Railroad Company to aid in the construction of its railroad through said township and the city of Laporte; that a canvass of the votes so taken was made and duly returned, by which it appeared that the aggregate number of votes given at the several voting places in favor of said appropriation and donation was one thousand three hundred and twenty-nine, and the aggregate number of votes given against said appropriation and donation was fifty-one, making a majority of twelve hundred and seventy-eight votes in favor of said appropriation and donation. It is further alleged that afterwards, at their session of June, 1882, the board of commissioners again had the matter under consideration, and made an order that the sum of sixteen thousand seven hundred and fifty dollars (being one-half of the amount of said appropriation) be levied and assessed as a special tax on the duplicate for the year 1882, and that the auditor assess the same *pro rata* on all the property, real and personal, of the several owners, liable for taxation for State and county purposes in said Center township, on the tax duplicate for the year 1882, and that the same be collected as other taxes are collected, and that the remaining one-half of said appropriation be levied and assessed in like manner on the tax duplicate for the year 1883; and that in pursuance of said order the auditor of said county had entered said tax upon the tax duplicate of the county *pro rata* against all the property, real and personal, listed and returned for taxation in said Center township and in the city of Laporte, and that the duplicate has been placed in the hands of the appellee Herman Hansheer, county treasurer, who is proceeding to and will collect the said tax.

The appellants allege that said tax is illegal and void, and they set out in five separate special clauses or specifications of the grounds upon which they claim it to be illegal, as follows:

"*First.* That the petition does not state facts sufficient to authorize said board of commissioners to order or in any manner authorize the appropriation, for the aid of the said railroad company, under any law of this State; that it is prayed therein that an appropriation for the said railroad company be made by the board of commissioners of said county of Laporte; and that the said petition is not, and does not purport to be, signed by one hundred freeholders of said county, and it is not alleged therein that said county borders on the line of the State, or on a river forming a State boundary.

"*Second.* That the order of said board of commissioners, made on the 21st day of June, 1881, for the holding of an election on the 25th day of July, 1881, for the purpose of taking the votes of the voters of the said Center township, upon the subject of an appropriation of money to be made by said Center township, was not in accordance with the prayer of said petition, and there was no petition before said board therefor, and said order was wholly without authority of law.

"*Third.* That said election was illegal, in that it was held within, and embraced the votes of the voters in, the incorporated city of Laporte, within the territorial limits of said Center township, as well as the votes in said township not within said city.

"*Fourth.* That on the 21st day of June, 1881, the date of the filing of said petition, there was and is now, situated within the territorial limits of said Center township, the city of Laporte which was and now is duly incorporated under the laws of this State, and then contained a population of about eight thousand, and the legal voters therein largely exceeded those of the township without the city; that within the corporate limits of said city, there was property real and personal, which, for the year 1880, was valued and assessed

on the tax duplicate, delivered to the treasurer of the county of Laporte for said year, at $2,260,730, and the taxable property of said township, on said tax duplicate for the year 1880, without the limits of said city, amounted only to $865,-385. The property within the limits of said city was assessed and designated upon said duplicate, and upon all other duplicates since delivered to said treasurer, as property in the city of Laporte, and separate and apart from that without said city limits, and the property without such city limits only appearing on said duplicate as the property within said Center township; wherefore the appellants averred, that said sum of $33,500, so ordered to be appropriated by said board of commissioners, exceeded two per cent. of the taxable property of said Center township, on the tax duplicate of the county, so delivered to the treasurer of the county for the year 1880, the year preceding the filing of said petition.

"*Fifth.* That on the 16th day of July, 1881, the board of directors of said Indiana and Michigan Railroad Company entered into an agreement with the board of directors of the Chicago and West Michigan Railroad Company, the Grand Rapids, Newaygo and Lake Shore Railroad Company, and the Grand Haven Railroad Company, corporations organized under the laws of the State of Michigan, and owning continuous and connected lines of railroad within said State, and connecting with the railroad of the Indiana and Michigan Railroad Company,—said lines of railroad not being parallel lines, or lines diverging and converging, and conterminous; by the terms of which agreement it was agreed to merge the stock, franchises and property of the said several companies, into the stock, franchises and property of a new corporation to be known as the Chicago and West Michigan Railroad Company; that at the time of executing the said agreement, the following statute of the State of Michigan, on the subject of the consolidation of railroad companies within the State, with such companies without the State, was in force:

"'Sec. 50. Any railroad company, in this State, forming a

continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into a single corporation: *Provided,* That no such companies having parallel lines, or lines diverging and converging, but being conterminous, shall be permitted to consolidate themselves into one corporation. The directors of said two or more corporations may enter into an agreement, under the seal of each, for the consolidation of said two or more corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of the directors thereof, which shall not be less than seven nor more than thirteen, the time and place of holding the first election of directors, the number of shares of capital stock in the new corporation, the amount of each share, the manner of converting the shares of capital stock, in each of said two or more corporations, into shares in such new corporation, with such other details as they shall deem necessary to perfect such consolidation of said corporation; and such new corporation shall possess all the powers, rights and franchises, conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization, not inconsistent with the provisions of this act. Such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations until after it has been submitted to the stockholders of each of said corporations separately, at a meeting thereof to be called as aforesaid, and has been sanctioned by such stockholders by the vote of a majority in interest of the stockholders present at such meeting, in person or by proxy, and voting, each share of capital stock being entitled to one vote; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders separately, after being submitted to each in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said two or more corporations.

"'Sec. 51. Upon making the agreement, mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the Secretary of State, the said two or more corporations, mentioned or referred to in the said section, shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect, as provided therein.'

"That under the authority of said statute of Michigan and of the statutes of Indiana on the same subject, and in pursuance of said statutes, the said several boards of directors entered into said agreement, subject to the sanction of the stockholders of said several corporations; that, after due notice thereof, the stockholders of the said several companies, organized under the laws of Michigan, held meetings on the 28th day of September, 1881, and the stockholders of the said Indiana and Michigan Railroad Company, after like notice, held a meeting on the 29th day of September, 1881, at each of which stockholders' meetings resolutions were adopted sanctioning and fully ratifying the said agreement for consolidation; that afterwards, to wit, on the —— day of October, 1881, a duplicate of said agreement, resolutions and other proceedings connected therewith was filed in the office of the Secretary of State of the State of Michigan, and also, on the 5th day of October, 1881, a like duplicate was filed in the office of the Secretary of State of the State of Indiana, and thereupon, in pursuance of said agreement, the said Indiana and Michigan Railroad Company surrendered up her franchises, rights and property to the said Chicago and West Michigan Railroad Company, and the stockholders of the said Indiana and Michigan Railroad Company surrendered their stock in said corporation to said Chicago and West Michigan Railway Company, and the directors and officers of said Indiana and Michigan Railroad Company surrendered and abdicated their several trusts, and said Indiana and Michigan Railroad Company has not, since the said 29th

day of September, 1881, when said agreement of consolidation was ratified, and by reason thereof, had any existence in fact or law, and said several corporations became merged into the said Chicago and West Michigan Railway Company; and the plaintiffs say, that should said tax be collected, there is not and can not be any corporation or person who will be entitled to receive said proposed donation or any part thereof."

The prayer of the complaint was, that the appellees and each of them, and their respective successors in office, might be perpetually enjoined from demanding or attempting to collect the aforesaid tax, or any part thereof, and for all other proper relief.

The appellees' demurrers to each of the five clauses or specifications, above quoted, for the alleged want of sufficient facts therein to constitute a cause of action against them, were sustained by the court, and to these rulings the appellants excepted. They declined to amend or plead further, and judgment was rendered against them for appellees' costs.

Errors are assigned here, which call in question the decisions of the court below, in sustaining the appellees' demurrers to each of the five clauses or specifications of the appellants' complaint. The questions presented, or intended so to be, are the sufficiency in law of these clauses, specifications or paragraphs, to show that the proceedings in relation to the levy of the railroad tax in Center township were illegal, and that the collection of the tax ought not to be enforced.

In *Mustard* v. *Hoppess*, 69 Ind. 324, this court approved of the practice, pursued in this case, of stating in a single paragraph of complaint the proceedings had in relation to the levy of the tax, and then setting forth, in separate clauses or paragraphs, the several grounds of particulars in which it might be claimed that the assessment of the tax was illegal and void, and the reasons why the collection of such tax ought not to be enforced. It was there held that, in such a case, the sufficiency of each separate clause or paragraph might be tested by a demurrer thereto, for the want of facts,

as fully and to the same extent as if all the facts had been repeated in each clause or paragraph. See, also, *Sheetz* v. *Longlois*, 69 Ind. 491.

In this case we will consider and decide the several questions arising under the errors assigned, in the same order they have been presented and discussed by appellants' learned counsel, in their able and exhaustive arguments, oral and printed. The first and second paragraphs are considered together by counsel, and upon these the only point made is that the petition filed prayed for an appropriation by the county board, and not by Center township. We do not think that this objection to the validity of the tax assessment is well taken or can be sustained. When once the constitutionality of the legislation of this State, authorizing a civil township to aid in the construction of a proposed railroad by self-imposed taxation, was firmly settled by the decisions of this court, it then became the duty of the courts, in furtherance of the objects to be accomplished thereby, to construe liberally the provisions of the statute and the proceedings had thereunder, and in attempted compliance therewith. It was impossible, as it seems to us, for the county board of Laporte county, or the voters of Center township, to misapprehend or mistake the meaning and intention of the petitioners in the language used in their petition. It is true that the intention and purpose of the petitioners were not so clearly expressed as they might, and, doubtless, would have been, had the petition been drafted by counsel learned in the law. It does not appear, however, that the county board, or Center township, or the qualified voters of such township, were misled or deceived by the ambiguous or uncertain phraseology of the petition; but, on the contrary, it is apparent, we think, that no interested party was thus misled or deceived, in respect to any of the matters complained of. In *Wilson* v. *Board, etc.*, 68 Ind. 507, in considering an objection to the petition somewhat similar to the one here made, this court

said: "The petition is loosely worded, and was not drawn with legal accuracy and precision; but it seems to us that the object and purpose of the petitioners could not be misunderstood by any one, and certainly were not misunderstood by the county board, as is clearly shown by the record of their proceedings on said petition." On the point under consideration see also the cases of *Faris* v. *Reynolds*, 70 Ind. 359, and *Goddard* v. *Stockman*, 74 Ind. 400.

Our conclusion is that the court committed no error in sustaining the appellees' demurrers to the first and second clauses or paragraphs of the appellants' complaint.

In the third clause or paragraph of their complaint, the appellants alleged that the election, upon the question of the railroad-aid appropriation, "was illegal, in that it was held within, and embraced the votes of the voters in the incorporated city of Laporte, within the territorial limits of said Center township, as well as the votes in, said township not within said city." We are clearly of the opinion that the election was not illegal upon the ground, or for the reason stated in the third clause or paragraph of the complaint. An incorporated city within a civil township is a part of such township. A citizen of the city is a citizen of the township within which such city lies, and he has all the rights and is subject to all the burthens, in regard to township matters, of any citizen of the township who is not a citizen of such city. If he be a qualified voter, he can vote at any township election, and is eligible to any township office. It was expressly held by this court in *Reynolds* v. *Faris*, 80 Ind. 14, that for the purpose of a tax in aid of a railroad, an incorporated town, within a township, is a part of such township, and we know of no sufficient reason for holding that, for the purpose of such a tax, an incorporated city is not a part of the civil township within whose boundaries such city lies. Therefore the demurrer to the third clause or paragraph of the complaint was correctly sustained.

What we have said in considering this third clause is practically decisive of the question presented upon the fourth clause or paragraph of the complaint, adversely to the appellants. All taxable property within the boundaries of Center township, as well such property as was within the corporate limits of the city of Laporte as that which was not within the city limits, is liable to township taxation for the purpose of the appropriation by Center township in aid of the proposed railroad. Therefore the fact that the amount of the appropriation voted was in excess of two per centum of the taxables, outside of the city limits, when it further appeared that such an amount was less than two per cent. of the entire taxables of the township within and without the city limits, did not vitiate or avoid the tax in aid of the appropriation. *Reynolds* v. *Faris, supra; Irwin* v. *Lowe*, 89 Ind. 540; *State* v. *Troth*, 34 N. J. L. 377. There is no error, therefore, in the ruling of the circuit court in sustaining the demurrer to the fourth clause or paragraph of the complaint.

In the fifth and last clause or paragraph of their complaint the appellants seek to enjoin the collection of the tax upon the grounds that, after the appropriation was voted in aid of the designated railroad, the railroad company had consolidated, under and in conformity with the laws of this State and the State of Michigan, with certain railroad corporations of the latter State; that, by force of such consolidation, the railroad company, to which the appropriation was voted, ceased to exist from and after the 29th day of September, 1881; and that, since the day last named, there was and had been no railroad company in existence authorized by law to take and receive such appropriation. It is claimed, on behalf of the appellants, that, at the time of the consolidation, the railroad company theretofore existing had no right to, or interest in, the appropriation voted, which would pass to or vest in the consolidated company. This claim is founded, we apprehend, upon repeated decisions of this court to the ef-

fect that where an appropriation has been voted to aid in the construction of a railroad the railroad company will acquire no right or interest in the appropriation, which it can enforce or protect by suit in its own name, until, at least, the money appropriated has been collected. These decisions had their origin in the constitutional provision which forbade a county to "subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription." Section 198, R. S. 1881. It will be observed that no such prohibition, in regard to townships, is to be found in the Constitution. See *Bittinger* v. *Bell*, 65 Ind. 445, on page 457.

In *Board, etc.*, v. *State, ex rel.*, 86 Ind. 8, after a careful examination of the statutory provisions in relation to township appropriations in aid of railroads, this court said: "When an appropriation of not exceeding two per centum of the value of the taxable property of the preceding year has been lawfully made, such an appropriation becomes a binding obligation upon the township, from which it is not discharged by any subsequent shrinkage in the value, or the destruction of any part, of its taxable property."

In such an obligation of the township, we are of opinion that the railroad company to which the appropriation has been lawfully made acquires such a right and interest as, upon its future consolidation with other railroad corporations, will pass to and vest in the consolidated company. This is so, we think, whether the railroad company to which the appropriation was voted did or did not, by force of the consolidation, cease to exist as a corporation for every purpose.

Our conclusion is that the complaint in this case did not state facts sufficient to entitle the appellants to an injunction as prayed for, and that the demurrers thereto were correctly sustained. The judgment is affirmed, with costs.

Filed March 7, 1884.

No. 11,047.

ELSTON v. PIGGOTT ET AL.

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FOREIGN CORPORATION.—*Judgment.—Decree of Foreclosure.—Title.—Abatement.*—A decree of foreclosure and title acquired under a sale pursuant thereto by a foreign corporation plaintiff can not be questioned upon the ground that the corporation had not filed a power of attorney as required by section 3022, R. S. 1881, the fact being available only by answer in abatement.

SAME.—*Comity.—Right to Purchase, Hold and Convey Lands.*—A foreign corporation, in whose favor a decree is rendered, may, in this State, purchase lands at judicial sale thereon and hold and convey the same, as there is no statute forbidding it.

SAME.—*Constitutional Law.—Title to Real Estate.*—A foreign corporation had commenced a suit to foreclose a mortgage in the United States Circuit Court before the statute, R. S. 1881, sections 3029, 3030, were enacted, and obtained a decree afterwards. It began another suit against another party in that court after that statute took effect, and still later it became the purchaser of lands sold at judicial sale to satisfy its first decree, and took a deed therefor.

Held, that the corporation took title, notwithstanding the statute, which is void so far as by its terms it undertakes to affect the title.

PARTITION.—*Effect on Title Afterwards Acquired.—Demand.—Ejectment.—Estoppel.—Tenants in Common.*—A., holding and claiming title to two-thirds undivided of a tract of land acquired by purchase from the assignee in bankruptcy of B., brought suit against the wife of B., who by reason of the sale had, under the statute, become the owner in fee of the remaining third. At the same time A. held by assignment a certificate of purchase of the whole tract, made to satisfy a decree against B. and wife upon a mortgage executed by both, the time for redemption not having expired at the termination of the suit for partition which resulted in assigning to A. and the wife of B. in severalty shares as above. Subsequently, A. by reason of non-redemption took a deed upon the certificate.

Held, that A. was not estopped by the decree in partition from asserting the new title thus acquired.

Held, also, that the certificate acquired by A. while a tenant in common with B.'s wife did not inure to the benefit of both, inasmuch as their co-tenancy did not give rise to any relation of trust or confidence.

Held, also, that A. might maintain ejectment against the wife of B. without calling upon her to redeem, or demanding possession.

JUDICIAL SALE.—*Right of Tenant in Common to Purchase.*—A tenant in common has a right to purchase at a judicial sale his co-tenant's interest in the joint property.

From the Montgomery Circuit Court.

T. H. Ristine, H. H. Ristine, E. C. Snyder, G. D. Hurley, B. Crane, T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and *E. Daniels*, for appellant.

G. W. Paul and *J. E. Humphries*, for appellees.

ELLIOTT, J.—The first question which we are required to decide is this: Is a decree and sale obtained by a trustee of a foreign corporation, whose agent has not filed a power of attorney as required by the act of June 17th, 1852, so destitute of force as to pass no title to the trustee who becomes a purchaser at the foreclosure sale? We think this question is not a difficult one. The failure of the agent of the corporation to file the power of attorney required by the statute was a matter to be pleaded in abatement in the suit in which the decree was rendered. *Walter A. Wood, etc., Co.* v. *Caldwell*, 54 Ind. 270 (23 Am. R. 641); *Domestic Sewing Machine Co.* v. *Hatfield*, 58 Ind. 187; *Daly* v. *National Life Ins. Co.*, 64 Ind. 1; *Singer Manufacturing Co.* v. *Brown*, 64 Ind. 548; *Johnson* v. *State*, 65 Ind. 204; *Smith* v. *Little*, 67 Ind. 549; *Behler* v. *The German Mutual Ins. Co.*, 68 Ind. 347; *The American Ins. Co.* v. *Wellman*, 69 Ind. 413; *Singer Manufacturing Co.* v. *Effinger*, 79 Ind. 264; *Finch* v. *Travellers Ins. Co.*, 87 Ind. 302. The question as to the right of the parties to plead matters in abatement was settled by the decree of the Federal court, and can not be litigated in an attack upon the decree or the sale made under it. If, therefore, the trustee should be regarded as the corporation for which he was trustee, still no question as to the right to prosecute the suit can now be made, for the decree put an end to all such questions.

It follows as a necessary consequence, that, having obtained a valid decree, the plaintiff in the suit had a right to enforce it in the usual manner. The decree settled all questions as to the power of the court to render it, and there can be no interference with the complete execution of the decree for any cause involved in the suit which resulted in the decree. The

time for objecting that there was no right to prosecute the foreclosure suit has gone by, and the decree can not be rendered nugatory for a cause which might have constituted ground for a plea in abatement.

A plaintiff who has a valid decree has all the incidents of such a decree, and necessarily the right to have it executed according to law. It would be very strange if a plaintiff having a valid decree should not be allowed to take any steps to secure its benefit, by having it executed. A valid decree is always enforceable. To be sure, some act may occur subsequent to its rendition which may destroy its force; but this is a very different question from the one here under immediate discussion, for here the question is, can the enforcement of the decree be defeated because the plaintiff would not have been entitled, had defence been made, to maintain his suit? We are perfectly satisfied that the enforcement of a decree in favor of a foreign corporation can not be prevented by showing a failure to file a power of attorney, and that such a failure will not invalidate a title acquired under the decree.

The second question is: Can a foreign corporation, in whose favor a decree is rendered, hold and convey real estate purchased under the decree in cases where there is neither a prohibitory statute, nor a statute granting such right? We state the question as the record presents it; for the inquiry is not as to the general power to hold real estate, but as to the power to acquire it in payment of debts. The question really narrows to a compass more limited than that embraced in the question as we have stated it, for it comes to this: Has the foreign corporation a right to buy at execution sales made on judgments in its favor? That the question is thus limited is plain when it is brought to mind that an authority to do an act necessarily implies authority to do whatever is a necessary incident of the principal act. It seems clear that the right to buy necessarily implies the power to hold and enjoy what is bought. The right to buy would be a barren right without the authority to hold and enjoy the property purchased.

Foreign corporations are allowed to transact business in our State, and for many years no restrictions were placed upon them. Our reports contain many cases recognizing their right to do business within our borders. Liens have been enforced in their favor; titles have been quieted in them; possession of land has been awarded them, and contracts have been enforced in their behalf. We have found no case questioning their right to do business in this State, nor do we see how this right can be questioned, except where there is a statute directly bearing upon the subject, for it has long been the law that a corporation may transact business, within the scope of its corporate powers, beyond the State which gave it existence. *Bank of Augusta* v. *Earle*, 13 Peters, 519, 592; *Christian Union* v. *Yount*, 101 U. S. 352.

It is true that corporations are not, in a strict sense, citizens of the United States, and can not claim immunities upon that ground. *Paul* v. *Virginia*, 8 Wal. 168; *Ducat* v. *Chicago*, 10 Wal. 410; *LaFayette Ins. Co.* v. *French*, 18 How. 404; *Ducat* v. *Chicago*, 48 Ill. 172; *People* v. *Fire Association*, 92 N. Y. 311. Although a corporation can not claim the protection of the Federal Constitution on the ground of citizenship, it is, nevertheless, entitled to do business, until forbidden by statute, in other States than that by which it was created. It was said by the Supreme Court of the United States in *Bank of Augusta* v. *Earle, supra:* "We think it well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union." This doctrine is strongly re-asserted in the later case of *Christian Union* v. *Yount, supra.* This principle of the comity of nations is part of the common law, and is by long settled rules, as well as by positive statute, engrafted on our law. Story Conflict of Laws, 36, 37; *Thompson* v. *Waters*, 25 Mich. 214 (12 Am. R. 243); *Curtis* v. *McCullough*, 3 Nev. 202.

In the absence of a statute prohibiting it, corporations may, it has often been held, acquire property in a foreign State. This doctrine is declared in *Cowell* v. *Springs Co.*, 100 U. S. 55, where it was said, in speaking of the position that a corporation could not acquire property in a foreign State: "The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold, and transfer property there equally as individuals." But in the present case we need not go to this length, although the authorities would fully warrant us in doing so, for the question here is a much narrower one.

It is certainly true that an execution plaintiff may, unless forbidden by statute, bid in property at his own sale, and he who asserts the contrary must produce the statute. A person, artificial or natural, resident or non-resident, having a right to litigate, has substantially the same rights as ordinary litigants, unless, indeed, there is some statute restricting them. If a corporation has a right to a judgment or decree, it necessarily follows that it may enforce it by purchase of the property seized under the process issued on the judgment or decree.

It is generally held that States possess the power to repeal the law of comity, or to refuse to recognize it when contrary to the policy of the State. *Bank* v. *Earle, supra; Myers* v. *Manhattan Bank*, 20 Ohio, 20; *Runyan* v. *Coster*, 14 Peters, 122; *U. S., etc., Co.* v. *Lee*, 73 Ill. 142 (24 Am. R. 236); *People* v. *Fire Ass'n, supra.* As foreign corporations are not citizens of the United States within the meaning of the Constitution, the law of comity may be denied to them. *Paul* v. *Virginia, supra; Liverpool Ins. Co.* v. *Mass.*, 10 Wal. 566; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535. But we do not think our Legislature has denied the rights of foreign corporations to buy and hold real estate under sales made upon executions and

decrees. We do not regard the statute of March, 1861, as denying corporations the right to purchase lands in payment of debts, and we know of no case intimating such a doctrine. In many instances property rights of corporations are protected as those of natural persons. A charter confers rights which are within the constitutional provision forbidding the enactment of laws impairing the obligation of contracts. A decision giving peculiar emphasis to this familiar rule is *Travellers Ins. Co.* v. *Brouse*, 83 Ind. 62. So, too, are they within the provision prohibiting the taking of property without compensation. *Erie R. W. Co.* v. *State*, 31 N. J. L. 531. For purposes of taxation, foreign corporations are regarded as citizens. *State of Indiana* v. *American Ex. Co.*, 7 Bissell, 227. In *Lumbard* v. *Aldrich*, 8 N. H. 31, it was said: "If foreign corporations may sue here, they must be entitled to the benefit of their judgments, according to the ordinary course of law. They may, therefore, levy on land, in satisfaction of their executions." Further on in the same opinion it is said: "If they may thus acquire a title, it would be exceedingly absurd to say that they might not maintain an action for possession, or that they could not convey the title thus acquired." Cooley Const. Lim. (5th ed.) 152. It has indeed been expressly decided by this court that a foreign corporation may maintain an action for possession of real estate. *Smith* v. *Little*, 67 Ind. 549.

We know, as matter of general history, that for many years foreign corporations have loaned money on mortgage security, and that there is no decision questioning their right to buy land at sales on decrees in their favor. We know, also, that their right to make such loans has been expressly recognized. *Pancoast* v. *Travellers Ins. Co.*, 79 Ind. 172. We know, too, that the Legislature has tacitly, if not expressly, recognized this general right by enacting laws restricting and limiting it. If there is no such general right, then, for a long series of years the Legislature has been paying deference to a mere shadow. If there is no such right, then a vain and idle

course has been pursued in adopting statutes limiting and restricting an imaginary general right. If there is no such right, the Legislature has been fighting a phantom. But there is such a right, and the Legislature has not been doing a vain thing in attempting to hedge it about by restrictions and limitations.

The question we next encounter may be thus stated: Is a title to land acquired by a foreign corporation under a sale made December 24th, 1879, on a decree rendered in its favor by the Circuit Court of the United States on the 2d day of July, 1879, in a suit on a mortgage executed long prior to 1879, commenced in February of that year, made void by the fact that in June, 1879, the corporation sued in that court on a mortgage executed by a person having no connection whatever with the person who executed the mortgage sued on in the first named suit?

Two facts are embraced in our statement of the question which should be kept prominently in view, namely, that the mortgage on which the suit first mentioned was based was executed prior to 1879, and that suit was pending in the Federal court in February of that year. Both of these facts existed prior to the passage of the act of 1879, of which we are to presently speak. The question, then, is not as to the effect of that act upon rights acquired subsequent to its passage, but upon rights acquired prior to its enactment. The execution of the mortgage and the institution of the suit unquestionably gave the corporation substantial rights. But there is still another right which requires consideration, and that is, the right of the Federal court to proceed in the suit over which it had undeniably acquired ample jurisdiction. The question of the validity of the act of 1879 necessarily involves the subordinate question of the right of the Legislature of this State to deprive a litigant lawfully in the United States court of a right to there prosecute his suit to final effect. But more than this is involved, for, bound up in the general question is that of the right of the Federal court to

pursue to the end a suit over which it has acquired plenary jurisdiction. A delicate question, therefore, faces us; for we must consider how far a State may impair rights acquired by suitors in a Federal court, and, also, to what extent, if at all, a State may impair the force of a decree rendered by that court in a suit pending at the time the statute was enacted. This case does not present the broad question of the power of the State to compel foreign corporations to refrain from suing our citizens in the United States courts, but presents the question of the power to compel a suitor whose suit is pending to discontinue proceedings, and presents, also, the question of the power of the State to control proceedings of the Federal court in a suit over which rightful jurisdiction had been assumed before the enactment of the statute.

We suppose that no one doubts that only Congress can control the jurisdiction and procedure of the Federal courts. A statute of the State which should assume to control the jurisdiction or procedure of the United States courts would, without doubt or hesitation, be pronounced void. If, therefore, the act of 1879 can be regarded as assuming to control the jurisdiction and procedure of those courts in suits pending at the time of its enactment, it must be declared to be without force. That act reads thus:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana,* That every foreign corporation now doing, or transacting, or that shall hereafter do or transact any business in this State, or acquire any right, title, interest in, or lien upon real estate in this State, that shall transfer or cause to be transferred from any court of this State, to any court of the United States, save by regular course of appeal, after trial in the State courts, any action commenced by or against such corporation in any court of this State, by or against any citizen or resident thereof, or that shall commence in any court of the United States, in this State, on any contract made in this State, or liability accrued therein, any suit or action against any citizen or resident of the State of Indiana,

shall thereby forfeit all right and authority to do or transact business in this State, or hold real property or liens thereon, and all contracts between such corporations and citizens, or residents of this State, made after the passage of this act, shall be rendered void, as in favor of such corporation, but enforceable by such citizen at his election.

"SEC. 2. The provisions of this act shall be, and the same are hereby made conditions upon which such corporations may be authorized to do business in this State, or hold title to, or liens on real estate therein."

We are quite clear that this act can not have force in cases where, at the time of its enactment, the foreign corporation had a suit rightfully pending in the circuit court of the United States. To permit it to operate in such a case would be to permit a statute of the State to control the proceedings of the Federal court in a case in which jurisdiction had been rightfully acquired. Having acquired jurisdiction no statute of the State could divest it, nor could any statute make null the decrees of the court by denouncing a penalty against the suitor in whose favor it was rendered. If the statute is not operative, then the litigant is entitled to proceed as if there were no statute at all, so that the decision of the invalidity of the statute decides, necessarily, the question we last stated as the one for discussion.

Corporations are entitled to sue in the United States courts upon the same terms as individuals, and to this extent they are recognized as having substantially the same rights as citizens. In the case of *Bank* v. *Deveaux*, 5 Cranch, 61, it was held that a corporation was not a citizen within the meaning of the Constitution, but it was also held that it might, upon the same terms as a natural person, sue in the Federal courts. Chief Justice Marshall said in the course of his opinion: "Repeatedly has this court decided causes between a corporation and an individual, without feeling a doubt respecting its jurisdiction." A long line of decisions firmly maintains the proposition stated by us. *Muller* v. *Dows*, 94

U. S. 444; *Railway Co.* v. *Whitton*, 13 Wal. 270; *Louisville, etc., R. R. Co.* v. *Letson*, 2 How. 497; *Marshall* v. *Baltimore, etc., R. R. Co.*, 16 How. 314; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227; *Ohio, etc., R. R. Co.* v. *Wheeler*, 1 Black, 286; *Insurance Co.* v. *Francis*, 11 Wal. 210. In *Louisville, etc., R. R. Co.* v. *Letson, supra*, it was said: "But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued." It is apparent from the decisions to which we have referred that it is doubtful whether in any case the State can compel foreign corporations to refrain from suing in the United States courts, and it is quite clear that it can not wrest from one of those courts a suit in which jurisdiction had been acquired prior to the enactment of the statute.

Our answer to the question stated is that the title of the purchaser at the sale on the decree rendered by the United States Circuit Court was not made void by the commencement of the subsequent suit in that court.

The question which next demands consideration may be thus stated: Is one who brings a partition suit, holding, at the time, a deed from an assignee in bankruptcy conveying two-thirds of the land, and holding, also, a certificate issued upon a sale on a decree of foreclosure embracing all the land, estopped by a decree rendered in the partition suit, awarding

to him two-thirds of the land and to the defendant one-third, from asserting the title subsequently acquired by a deed executed pursuant to the certificate of sale.

The right conferred on the holder of the certificate of sale was not a title to the land; it merely invested him with a lien on the land, which might ripen into a title by the failure of the debtors to redeem the land within the time prescribed by law. *State, ex rel.*, v. *Sherill*, 34 Ind. 57; *Davis* v. *Langsdale*, 41 Ind. 399; *Hasselman* v. *Lowe*, 70 Ind. 414; *Felton* v. *Smith*, 84 Ind. 485; *Wilhite* v. *Hamrick*, 92 Ind. 594. When the partition suit was commenced, the plaintiff in that suit was not the owner of all the land, but was the owner of two-thirds, which was properly set off to him. The title which he acquired to all the land was a subsequent one.

It is settled that a decree in partition operates only upon the title held at the time the suit was instituted, and has, ordinarily, no effect upon a title subsequently acquired. *Miller* v. *Noble*, 86 Ind. 527; *Crane* v. *Kimmer*, 77 Ind. 215; *Avery* v. *Akins*, 74 Ind. 283, see page 290; *Arnold* v. *Butterbaugh*, 92 Ind. 403.

A decree in partition does not create title; it merely severs possession and awards to each tenant his share in severalty. *Kenney* v. *Phillipy*, 91 Ind. 511; *Miller* v. *Noble*, *supra*; *Utterback* v. *Terhune*, 75 Ind. 363; *Teter* v. *Clayton*, 71 Ind. 237; *Avery* v. *Akins*, *supra*.

It results from these settled rules that the decree in partition does not estop the appellant from asserting the title acquired under the deed issued on the decree of foreclosure.

The title which a plaintiff is ordinarily required to set forth in the complaint in partition is such as will enable him to secure the decree of partition demanded in his complaint. It is not incumbent upon him to make an issue settling all questions of title, or all rights of lien holders, although it is proper for him to do so. If the appellees had desired to settle all questions in the partition suit, they might, doubtless, have done so, by tendering proper issues; but they chose

to go to trial on the single question of the right of Elston to a decree of partition, awarding him two-thirds of the land, and tendered no issue as to his rights as the holder of the certificate, issued upon the sale made on the decree of foreclosure. Nothing more was embraced in the issues in the partition suit than Elston's right to the two-thirds of the land, and this was all that was adjudicated. It was, indeed, all that could have been properly adjudicated under the issues, for only a claim to two-thirds of the land was then asserted.

The application of these legal principles secures a just result in the present instance. Mrs. Piggott had joined her husband in executing the mortgage sued on in the United States court, was a party to the suit to foreclose that mortgage, and was, of course, chargeable with knowledge that the decree covered all the land, that it was unsatisfied when the partition suit was brought, and that the time for redemption had not then expired. She could not, therefore, have any reason for inferring that Elston was asserting a title founded on the decree, since that would have been a title to the whole, and not merely two-thirds, of the land. She had full knowledge of the extent of the title he asserted, and must have known that it embraced only her husband's interest, and was founded on the sale made by the assignee of her husband, under the order of the Federal court in the bankruptcy proceedings.

The question which is next encountered may be thus stated: Does the fact that the appellant, at the time he acquired the certificate of sale issued on the decree of foreclosure rendered on the mortgage executed by Albert Piggott, the husband, and Martha J. Piggott, the wife, held a conveyance for two-thirds of the land from the assignee in bankruptcy of Albert, the husband, executed after the sale on the decree, preclude him, the appellant, from asserting against Martha J., the wife, the title founded on the deed executed upon the foreclosure sale?

Appellee's counsel contend that the appellant is precluded from asserting title under the foreclosure sale, because he was,

as they affirm, a tenant in common with Martha J. Piggott, and could not, therefore, buy in an outstanding lien and build a title on it. The general rule unquestionably is, that one tenant in common can not, by purchasing an outstanding lien, acquire a title which will evict his co-tenant. This rule, however, is subject to many exceptions and obtains only where the relation of tenants in common exists in strictness, and where the relation is such as to require mutual trust and confidence. It is impossible to perceive how one who buys at a sale made by an assignee in bankruptcy of the husband's interest becomes charged in such a case as that embraced in our general question, with duties of trust and confidence to the wife of the bankrupt. The title is not a common one; the interests are not reciprocal, and there is no fiduciary relationship created. The title is secured by virtue of a judicial sale, and not by the same instrument, nor from the same source, as that from which the wife's claim is derived. There is, we repeat, nothing in such a case to create relations of trust and confidence, and, therefore, the reason of the rule applicable to ordinary cases fails, and the time-honored doctrine is, that where the reason of the rule ceases so does the rule itself. An examination of the cases will show that we are right in stating that the reason of the rule is that the relationship is one imposing trust and confidence and requiring the tenants not to assume positions of hostility. Mr. Freeman says:

"If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises." Freeman Cotenancy & Part., section 155; *Roberts* v. *Thorn*, 25 Texas, 728; *Rippetoe* v. *Dwyer*, 49 Texas, 498; *King* v. *Rowan*, 10 Heiskell, 675; *Matthews* v. *Bliss*, 22 Pick.48; *Frentz* v. *Klotsch*, 28 Wis. 312; *Reinboth* v. *Zerbe, etc., Co.*, 29 Pa. St. 139; *Brittin* v. *Handy*, 20 Ark. 381.

It is not to be forgotten that the wife was bound both by the decree and the mortgage, and the case is, therefore, altogether different from one where the lien is created by the act of the law, as for taxes, or where the encumbrance was created by a former owner through whom both parties claim title. In such cases the burden is a common one. In the present case the burden rests alone on one of the tenants. This is so by virtue of her own act creating it, and by force of the decree directing the execution of the lien by sale of the property. Here, then, we find an essential element not found in cases to which the general rule is ordinarily applied.

The wife, as against the mortgagee, owned a mere equity of redemption. *Kissel* v. *Eaton*, 64 Ind. 248; *Haggerty* v. *Byrne*, 75 Ind. 499; *Eiceman* v. *Finch*, 79 Ind. 511; *Baker* v. *McCune*, 82 Ind. 585; *Vermillion* v. *Nelson*, 87 Ind. 194. This equity of redemption had been barred by the decree of foreclosure, so that nothing remained except the statutory right of redemption. *Eiceman* v. *Finch*, *supra*. This right was one to be exercised pursuant to law, and the failure to exercise it made the title absolute upon the execution of the sheriff's deed. Something more than a mere mortgage lien was, therefore, bought by the appellant, and he did not buy it by virtue of his position as a cotenant, nor did his cotenancy give him superior means of knowledge. No one could have had greater knowledge than Mrs. Piggott, by whom the mortgage was executed, and against whom the decree of foreclosure was rendered. Here, again, emerges an element pushing the case outside of the general rule.

There was, as already intimated, no obligation resting on the appellant to discharge the lien, for that obligation rested on the mortgagors. This obligation did not arise from the relationship of the parties, because the burden was not a common one, nor was there trust or confidence. There was, therefore, nothing which, in law or equity, imposed a duty on the appellant to pay off the mortgage and then sue for contribution. As no duty rested on him, and as he did not

avail himself of knowledge or opportunity supplied by his cotenancy, he was as free to buy as anybody else. The failure to redeem ensured the loss of the property to Mrs. Piggott, and whether the judgment plaintiff or his assignee, the appellant, gets the title, can really make no difference to her, for the loss is in either case precisely the same. Her opportunities for knowledge and for action were just the same against the appellant as against his assignor; she had just as much right to redeem from the one as from the other.

We are well satisfied that this case is not within the general rule forbidding one tenant in common from buying an outstanding lien and building title upon it, and that the case assumed in our question is the one made by the record.

Still another question requires discussion, and that takes this form: Was the appellant, having purchased the certificate issued on the decree of foreclosure after he had received the conveyance from the assignee in bankruptcy, bound to call upon Mrs. Piggott to redeem before instituting this action for possession of the entire land? It is assumed that the case is the ordinary one of tenants in common, and that, therefore, the suit should be for contribution, but what we have said proves the fallacy of this assumption. It is further argued that equity requires that the appellee Martha J. Piggott should have had an opportunity to redeem. This argument can not prevail. The deed made to the appellant gave him legal title, and if Mrs. Piggott be conceded a right to redeem, she should show affirmatively an offer to pay the sum necessary to redeem. It can not be doubted that the deed on the decree entitled the appellant, *prima facie* at least, to the rights of owner, and if Mrs. Piggott asks the interposition of equity she must show an offer to redeem. This is required by the familiar rule that he who asks equity must do equity. It follows, that even upon the concession that Mrs. Piggott had a right to redeem, she, and not the appellant, must move in that direction. He has at least a *prima facie* right, and, granting that it is only *prima facie*, still Mrs. Pig-

gott must do equity, and this imposes upon her the duty of showing her readiness and ability to do what equity requires. It was not a mere mortgage lien which appellant bought, for a decree had barred the equity of redemption and had completely put an end to the right created in favor of mortgagors by the courts of chancery. There was, it is true, a statutory right, but this right, if not exercised according to law, could not be exercised at all, and the failure to exercise it divested all title. The law gave an opportunity to redeem, and we do not think one acting in good faith, and taking no advantage of position or relationship, was bound to offer a new opportunity. The deed executed on the decree conveyed title, and if this title could be defeated in any event, it could only be in a case where there was an offer to do equity. Ordinarily, one who shows a valid judgment, execution, sale, and deed, makes out a case for possession, and we do not see anything in the mere position of the parties, as indicated by our question and shown by the record, taking this case out of this general rule. It is important to keep in mind that Mrs. Piggott had, when the certificate was issued, nothing more than a statutory right of redemption, and we can not conceive how this right grew into larger proportions by the purchase of the appellant from the assignee in bankruptcy. His purchase did not enlarge her rights, for unquestionably he was at full liberty to buy at a judicial sale. Nor is there any reason why he can not use the decree which he bought against all whose rights and equities are concluded by it. It is manifest, therefore, that if there be any right at all in Mrs. Piggott, it is nothing more than a right to redeem. We can not imagine how a right can grow into enlarged proportions against one who does nothing more than he might lawfully do, and surely the appellant had a right to buy from the assignee and from the holder of the certificate of sale. If we should go no further, we should be compelled to answer the question last stated against the appellees.

We can see nothing in the position occupied by Elston pre-

venting him from buying the certificate from the purchaser at the sale on the decree of foreclosure, and if he had a right to buy he certainly had a right to acquire title. It would be a perversion of law to declare a man not entitled to the benefit of a purchase which he has a full legal right to make. There was no uncertainty as to the existence and validity of the mortgage; a judgment after "a day in court" settled this question; nothing more remained for adjudication; nor was it possible to acquire an undue advantage, for all rights and equities were settled by the decree, and there remained the bare statutory right of redemption, and nothing more. We are not without authority upon this question. In *Gunter* v. *Laffan*, 7 Cal. 588, it was decided that one tenant in common might buy at an execution sale, and it was said: "Even if they were tenants in common, or partners, there is no rule of law which would forbid one partner or tenant in common from purchasing at a judicial sale, particularly under a judgment not obtained by him. There was nothing in the former relations of the parties which gave Laffan an unfair advantage, or the means of information superior to others, so as to enable him to sacrifice the rights of Gunter. The sale was of a certain interest in property, not of a share in rents and profits due. The deeds by which that interest was held were of record, and the title open and notorious. Any one desirous of purchasing, could have ascertained the value of the interest as easily as Laffan." A like ruling was made in *Brittin* v. *Handy*, 20 Ark. 381. Mr. Freeman says: "A cotenant may lawfully bid at a sale of the interest of a cotenant, or of the whole subject-matter of the cotenancy." Freeman Ex., section 292; Freeman Cotenancy and Partition, section 165. The relation existing between partners is closer and more confidential than that existing between tenants in common, and yet there seems to be no doubt that one partner may buy at a sale on an execution issued against a copartner. An English writer thus states the rule: "Upon a sale by the sheriff of the interest of one partner, there is nothing to

prevent a purchase of that interest by his copartners." 2 Lindley Partnership, 691. The same doctrine is asserted in American text-books. Herman Ex., section 358; Freeman Ex., section 292.

Our conclusion on this branch of the case is that the appellant had a right to buy the certificate of the plaintiff in the foreclosure suit, and to take title under it without calling upon Mrs. Piggott to redeem.

One question remains: Was it the duty of Elston, the appellant, to make a demand for possession prior to instituting this action? We find no difficulty in answering this question in the negative. He had a right to buy, and, having a right to buy, he acquired the position of the execution plaintiff, and an execution plaintiff may maintain ejectment without demanding possession. *Smith* v. *Allen*, 1 Blackf. 22.

Judgment reversed, with instructions to set aside the conclusions of law stated, and to state conclusions of law upon the facts found in favor of appellant, and render judgment thereon in his favor.

Filed Mar. 4, 1884.

No. 10,966.

Brown v. Owen.

Practice.—*Evidence.—Harmless Error.*—Where the answer to an improper question is harmless, there is no available error.

Same.—*Immaterial Evidence.*—Where the answer to a question asked could not, of itself, be material, and there is no offer to prove other facts which would make such answer material, the sustaining of an objection to such question is not erroneous.

Same.—*Motion to Strike out Evidence not Objected to.*—Where evidence is admitted without objection, a subsequent motion to strike it out comes too late.

Same.—*Cross-Examination.*—Cross-examination which relates to the same subject-matter as the examination-in-chief is proper.

Same.—*Immaterial Evidence.*—The admission of evidence which, though immaterial, is harmless, is not available error.

SAME.—*Impeaching Question.*—A question seeking to impeach the witness upon an immaterial point is improper.

LANDLORD AND TENANT.—*Cropper not Insurer Against Weather.*—One who agrees to farm the land of another and to deliver to the latter his share in grain is bound to use only ordinary care in gathering the crop, and is not an insurer against loss from bad weather.

From the Rush Circuit Court.

J. S. Scobey, for appellant.

W. A. Cullen and *B. L. Smith*, for appellee.

ZOLLARS, J.—Action by appellant against appellee. The case as made by the complaint, so far as it need be here stated, is as follows:

In August, 1881, appellant rented forty acres of his land to one Thomas Hardesty. Hardesty agreed to sow wheat upon the land, and in a good farm-like manner harvest and thresh the crop that might be raised, and for rent deliver to appellant one-half of the amount in the bushel, delivered at the threshing machine. Hardesty sowed the wheat. Just before harvest, in 1882, he sold his interest in the wheat to appellee, who assumed, and agreed to perform, Hardesty's contract with appellant. Appellee is charged with a violation of the contract, in that he neglected to harvest ten and one-half acres of the wheat, and failed to have threshed in proper time that harvested from twenty and one-half acres, by which failure it was exposed to wet and bad weather and damaged. By reason of these neglects and failures, it is averred, appellant was damaged in the sum of $196.57.

The case was put at issue by a general denial, with an agreement that all defences might go in under it. There was a trial by a jury and verdict for appellee. Over a motion for a new trial, judgment was rendered for appellee. From this judgment, appellant prosecutes this appeal. Under the assigned error in overruling the motion for a new trial, a number of questions upon the admission and exclusion of evidence are discussed by appellant's counsel, which we notice *seriatim*. In order that the objection urged may be properly

understood, it may be noticed that the contract between appellant and Hardesty was not in writing. As detailed in evidence, it was that Hardesty should sow the wheat upon forty acres of appellant's land, and at threshing time, at the machine, give him one-half in the bushel.

So far as we have discovered, there was no express undertaking or agreement as to any particular time or manner of doing the harvesting or threshing. The law, doubtless, implied that both should be done with such care and skill, as to time and manner, as would meet the requirements of good husbandry.

The claim of appellee was and is that his conduct met this requirement; that he could not harvest all of the wheat, because of rainy weather and the low, wet and muddy condition of the land; and that the wet weather prevented an earlier threshing of the wheat, etc. The jury, upon the whole evidence, concluded that the claim was well made and returned a verdict for appellee. If the facts are as found by the jury, appellee is not liable.

We can not disturb the verdict upon the weight of the evidence.

On cross-examination of Hardesty, appellee's counsel asked him if appellee had other wheat besides that purchased of Hardesty. Appellant objected to this question, and now insists that it was intended to elicit an insufficient excuse for delay and failure in harvesting the wheat upon appellant's land. The answer to the question is a sufficient answer to the objection. It rendered the question entirely harmless, if it was open to the objection urged against it. The answer was that appellee had other wheat, but that it was harvested before he bought the wheat of Hardesty. It is very apparent that having the other wheat could not and did not make any delay in harvesting that upon appellant's land. Appellant offered, but was not allowed, to show by Hardesty, that adjoining the wheat sowed by him and sold to appellee, there

was ten acres of wheat upon lower ground. This is the whole of the offer. We can not understand what possible bearing upon the issue between the parties the offered evidence could have had. It is said in appellant's brief that the purpose was to show that this wheat was upon lower ground and was harvested, and that this was competent to meet appellee's proof that he could not harvest his wheat because of the low and muddy condition of the land. The argument goes beyond what is shown by the record. The record contains no offer to show that the wheat upon the adjoining ten acres was or could have been harvested. For aught that appears, it may have rotted on the ground. We need not decide what might have been the proper ruling, had the offer been as full as stated in the brief.

It is insisted that the court below erred in refusing to strike out certain questions and answers. It is a sufficient answer to this to say that no objections having been made to either questions or answers, the objection, by a motion to strike out comes too late.

We may add that we regard the questions and answers as of but little consequence to either party.

On direct examination, the witness Barlow, in response to questions by appellant, stated that he was engaged in cutting the wheat for appellee; that he did not finish the cutting, and that the wheat was very ripe; and further, that the difference between the ground cut over and that not cut over was that the latter was black ground and lower. On cross-examination, appellee asked the witness to state the character of the ground, the condition of the weather, and the kind of wheat it was. The objection urged is that this was not a proper cross-examination. We think differently. It has reference to the same subject-matter inquired about by appellant.

Appellee, in testifying in his own behalf, stated that the wheat, or a part of it, lay unshocked for a day, or a day and a half after it was cut and bound. Immediately following this, he was allowed to state that at that time laborers were

scarce in the neighborhood. This was objected to as immaterial and improper. This answer confines the scarcity of laborers to the time the wheat lay unshocked, which was but a short time, as limited by the answer. Whether evidence of scarcity of laborers would have been competent as affording any excuse for delay in harvesting the crop, we need not decide. The evidence as here introduced was clearly harmless to appellant, as there is no evidence that appellee made any effort to procure such laborers, and he in no manner attempts to justify any delay or failure in the harvesting by such scarcity of laborers.

Appellee's statement that he could do but little threshing on account of the wet weather, was to meet the evidence on the part of appellant that he owned a machine and was engaged in threshing wheat for others. The purpose of appellant's testimony was to show that as appellee was threshing for others, he neglected to harvest and thresh the wheat in controversy. Appellee met this with the above statement in relation to the wet weather. We think it was competent.

And so, too, we think the evidence on the part of appellee, that a large amount of wheat was grown in the neighborhood, that it sprouted in the shock, and was thus damaged by the wet weather, was also competent. Appellee was charged with having allowed the wheat in controversy to sprout in the shock, and thus be wasted. His defence is that on account of the wet weather this could not be prevented, and that he exercised the proper and usual care in gathering and threshing the crop. The fact that other crops in the neighborhood were damaged by the wet weather, in like manner with that in dispute, was competent evidence to go to the jury, as tending to show that appellee's negligence was not the cause of the damage complained of. He was bound to use ordinary care and prudence in gathering the crop, but he was not an insurer against loss from wet weather. If the weather was such that it was impossible to gather the crop without loss, and he used ordinary care to prevent a loss, he

is not liable, under the contract, for such loss as could not be thus prevented.

After the close of the case in rebuttal, appellant recalled appellee and asked him if he had not at a certain time and place said to appellant, that he intended to pay him for the wheat not cut. An objection was sustained to the question. Appellant's counsel states that the purpose of the question was to impeach appellee by a contradiction of his answer. We are not informed by counsel, nor by the record, what the answer was expected to be. There is a statement in the record that appellant offered to prove by himself and another, that appellee made the statement embodied in the question. Why he did not make that proof is not shown. The court made no ruling on the offer, nor did appellee or the other party testify. The record upon this point is too defective to present any question to this court. And besides, the point upon which it was proposed to impeach appellee was not material and pertinent to the issue being tried. The action is not based upon any such statement by appellee, nor did appellant seek to elicit an answer for the purpose of strengthening his case. See *Paxton* v. *Dye*, 26 Ind. 393; *Fogleman* v. *State*, 32 Ind. 145.

Finding no available error in the record the judgment is affirmed, with costs.

Filed March 7, 1884.

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128 246

No. 10,135.

HACKLEMAN v. BOARD OF COMMISSIONERS OF HENRY COUNTY.

CONTRACT.—*Part Resting in Parol.—Evidence.—Statute of Limitations.*—Where a demand upon contract can not be established without the assistance of parol evidence, and therefore rests partly in writing and partly in parol, the bar of the statute of limitations is six years.

SAME.—*County Commissioners.—Record.—Pleading.—Presumption.*—A county is bound by contract to pay a claim barred by the statute of limita-

tions, only where its agreement appears by the record of the county board, and in pleading such agreement it will be presumed to rest in parol unless the record is averred.

From the Henry Circuit Court.

J. M. Morris, for appellant.

J. H. Mellett and *E. H. Bundy*, for appellee.

HAMMOND, J.—The appellant filed his petition before the board of commissioners of Henry county on April 6th, 1881, stating that the commissioners of said county had, on July 22d, 1862, made an order appropriating from the county treasury $8.33 per month to be paid for a period not exceeding three years from the date of the muster-in of the regiment to each enlisted man who should volunteer into either one of two companies to be raised from that county for the 69th Regiment of Indiana Volunteers. The order, a copy of which is filed with the petition, provided that the captains of said companies should certify to the auditor of the county the names of the enlisted men, with the date of the muster-in of the regiment; that such certificate should be recorded in the records of the county board, and that the auditor, in issuing warrants, etc., should be governed by the date of muster-in as shown by such certificate. The petition alleges that the appellant, who was a resident of said county, enlisted on July 25th, 1862, under said order of the county board, expecting to receive the benefit thereof, and intending to go into one of said companies of the 69th Regiment, but that, without his consent, he was mustered into Company "F" of the 84th Regiment of Indiana Volunteers, where he served as a private in the military service of the United States for three years and one month, and procured and filed with the county auditor the certificate of the captain of said Company "F" of said 84th Regiment, showing the date of the appellant's enlistment, the date of the muster-in of said regiment and the time of the appellant's service therein. The appellant asked for an allowance of $300. The

county board sustained a demurrer to the petition. The appellant appealed to the circuit court, where the demurrer was refiled and again sustained to the petition. From that decision an appeal was taken to this court, and the judgment of the circuit court was reversed. *Hackleman* v. *Board, etc.*, 78 Ind. 162.

On the case being remanded to the court below the appellant filed an amended petition, restating the facts contained in his first petition, and setting out the affidavit made by him before the recruiting officer at the time of his enlistment. The appellee answered the amended petition in three paragraphs: 1. The general denial; 2. That the appellant's cause of action did not accrue within six years next before the commencement of his action; 3. That the appellant's cause of action did not accrue within fifteen years next before the commencement of his action. The appellant demurred to the second and third paragraphs of the answer. The demurrer was overruled; he excepted and replied to said second and third paragraphs: 1. By restating the substantial averments of his petition; 2. That within six years last past the appellee had acknowledged said debt and agreed to pay the same; 3. That after the decision of this case in the Supreme Court, and while the appellee's petition for a rehearing was pending therein, the appellee agreed that, if the Supreme Court adhered to its first opinion, the appellee would make an order allowing the appellant's claim; 4. General denial. The appellee's demurrer was sustained to the first, second and third paragraphs of the reply, to which the appellant excepted. The general denial was then withdrawn from the answer and from the reply, and judgment was rendered for the appellee for costs. Errors are assigned in this court that the court below erred in overruling the appellant's demurrer to the second and third paragraphs of the appellee's answer, and in sustaining the appellee's demurrer to the first, second and third paragraphs of the appellant's reply.

The oath taken by the appellant on his enlistment and the

certificate of the captain of Company F, 84th Regiment of Indiana Volunteers, are not referred to in the order of the county board making the offer to those who should enlist in two companies of the 69th Regiment of Indiana Volunteers, and are consequently no part of said order. In order to recover, it would be necessary for the appellant to prove that he accepted the offer of the county board, enlisted in the service of the United States from Henry county before said two companies of the 69th Regiment were filled by recruits from said county; that he intended to go in to one of said companies, and was, against his will, put in said Company "F," of the 84th Regiment, and that he served in said Company "F" as an enlisted man for some period of time. As the appellant's claim could only be made out by the assistance of oral evidence, his claim rested partly in writing and partly in parol. In such case the six years' statute of limitations applies. In *Board, etc.*, v. *Shipley*, 77 Ind. 553, which, in all essential respects, was like the present case, it was said: "A contract can not be said to be in writing * * * so as to run twenty years, unless the parties thereto, as well as its entire terms and stipulations, can be gathered from the instrument itself, or from some other written instrument referred to therein, without the aid of parol evidence to ascertain either. If parol evidence has to be resorted to in order to ascertain the parties to a contract or its terms, the reason for extending the period of limitations to twenty years fails; and, though the contract may be partly in writing, yet, as it rests partly in parol, the six-year period of limitations applies as well as if the contract had rested entirely in parol."

There was no error in overruling the appellant's demurrer to the second paragraph of the appellee's answer. The second paragraph of the answer being sufficient, the third, setting up the fifteen years' statute of limitations, need not be considered.

The first paragraph of the reply, attempting to show that the contract was all in writing, failed to do so. The second

and third paragraphs of the reply did not aver that any record was made of the agreements therein alleged to have been made by the appellee, and were, for that reason, if for no other, insufficient. The county board could not, in any event, bind the county by agreements of the kind mentioned, without making a record thereof. As no record is averred, the promises are presumed to have been made orally, and the county is not bound thereby.

Board, etc., v. *Shipley, supra,* which is decisive of the present case against the appellant, has been cited with approval in *Stagg* v. *Compton*, 81 Ind. 171; *Pulse* v. *Miller*, 81 Ind. 190; *Board, etc.*, v. *Miller*, 87 Ind. 257; *McCurdy* v. *Bowes*, 88 Ind. 583; *High* v. *Board, etc.*, 92 Ind. 580.

We find no error in the record, and the judgment of the court below is affirmed, at the appellant's costs.

Filed March 12, 1884.

No. 8810.

LEMMON v. MOORE.

CRIMINAL CONVERSATION.—*Complaint.—Certainty as to Time.—Trespass.—Evidence.*—In an action for damages, for criminal intercourse with the plaintiff's wife, the complaint may, as in actions of trespass, lay the time of the alleged wrongful acts with a *continuando*, and the evidence may be directed to any time within that covered by the complaint.

SAME.—*Motion to Make More Specific.—Continuando.*—Where, in such action, the complaint lays the wrongful acts with a *continuando*, a motion to require the times of the alleged acts of adultery to be more specifically stated should be overruled.

SAME.—*Bill of Particulars.*—As a general rule, in complaints for torts, a bill of particulars will not be ordered.

SAME.—*Instructions.—Harmless Error.*—In such action, in the instructions to the jury as a whole concerning the material facts which the plaintiff must establish, by a fair preponderance of the evidence, to entitle him to recover, their attention was fairly directed to all of the evidence and circumstances adduced on the trial; but in one of such instructions they were told "If these facts are made out by the *plaintiff's* evidence, to your satisfaction, then you should find for the plaintiff."

Held, that, though such instruction was improper standing alone, it did not mislead the jury, and the error was harmless.

SAME.—*Falsus in Uno, Falsus in Omnibus.—Witness.*—The rule "*Falsus in uno, falsus in omnibus,*" applied to the evidence of a witness, must be directed to *material* evidence; and an instruction which asks the court to apply that rule to the testimony of a witness should be refused unless it so applies the rule.

SAME.—*Answer to Interrogatory.—Place of Sexual Acts Immaterial.*—Where, in such action, there was no question rendering the venue of any particular acts of illicit intercourse material to the plaintiff's right to recover, the jury committed no available error, in their answer to defendant's interrogatory, in failing to specify the exact place where such acts were committed.

From the Noble Circuit Court.

W. H. Coombs, J. Morris, R. C. Bell and *A. A. Chapin*, for appellant.

F. Prickett, H. G. Zimmerman and *I. E. Knisely*, for appellee.

NIBLACK, J.—Action by Alexander Moore against Stansbury W. Lemmon for the seduction of Hannah L. Moore, the former's wife.

The complaint was in two paragraphs.

The first paragraph charged that the defendant, on the 2d day of October, 1878, and on other days and times between that day and the commencement of this suit, debauched and carnally knew the plaintiff's wife.

The second paragraph charged the defendant with having, on the 7th day of June, 1879, and on divers other days and times between that day and the time of the commencement of this suit, unlawfully and wickedly debauched and carnally known the plaintiff's wife, and with having used his position as physician of the family to accomplish that result.

The defendant moved that the plaintiff be required to make both paragraphs of the complaint more specific by charging the particular times at which the alleged illicit intercourse between his wife and the defendant respectively complained of took place, but the court overruled the motion as to both paragraphs.

Answer, verdict for the plaintiff, assessing his damages at $1,300, and with it answers to special interrogatories submitted to the jury.

The third and fourth interrogatories submitted to the jury at the request of the defendant, with the answers to each, were as follows:

"3d. Did said parties" (meaning the defendant and the plaintiff's wife) "commit adultery in the plaintiff's house?" Answer of the jury: "Yes."

"4th. If so, when and where did they commit said adultery?" Answer of the jury: "Yes; between 2d (of) October, 1878, and 9th of July, 1879."

Before the jury were discharged, the defendant asked that they be required to answer this fourth interrogatory more specifically, both as to time and place, but the court refused to so require the jury, and a new trial being also denied, judgment followed upon the verdict.

The defendant, appealing, concedes that the complaint was sufficient upon demurrer, but insists that under the provisions of the code of 1852, which was in force when this cause was tried, he was entitled to have the charges constituting the *gravamen* of the action made more specific, so that he might have been better enabled to prepare for his defence.

The facts charged in the complaint constitute what is sometimes denominated an action of seduction, but more frequently an action for criminal conversation, and what is termed by some of the text-writers an action of trespass for adultery. Whatever designation may be applied to it, the case made by the complaint is, in all its essential features, analogous to and governed by the same general rules as an action of trespass. 3 Phillipps Ev. 521; 4 Bouvier Inst. 44. This cause, therefore, belongs to that class of actions in which a *continuando* may be laid, and, as a consequence, in which proof of the wrongful acts in issue, committed on any day within the time covered by the complaint, may be proved.

In treating of actions of the class to which this belongs,

Phillipps, *supra*, says: "Any number of adulterous acts may be proved within the limits of the time specified in the declaration; and in addition to this, with a view of explaining the nature of the intimacy between the parties, indecent familiarities may be proved, even earlier than the first mentioned day, though not a previous criminal connection." Vol. 3, p. 526. See, also, 2 Greenleaf Ev., section 624.

There was nothing in the code of 1852 inconsistent with the rules of pleading and evidence thus stated and recognized, and hence the circuit court did not err in overruling the defendant's motion to have the complaint made more specific.

There has been some discussion between counsel as to whether a bill of particulars might not have been required in this cause, but no such question was made in the circuit court, and consequently that question is not before us for decision. It may be remarked, however, that as a general rule a bill of particulars will not be ordered in an action for a tort. On this subject see the cases of *Pylie* v. *Stephen*, 6 M. & W. 813; *Stannard* v. *Ullithorne*, 3 Bing. N. C. 326; *Snelling* v. *Chennells*, 5 Dowl. P. C. 80; *Murphy* v. *Kipp*, 1 Duer, 659; *Derry* v. *Lloyd*, 1 Chitty 724, per BEST, J; *Strong* v. *Strong*, 1 Abb. Pr. N. S. 233; *Henry Ward Beecher's Case*, p. 80; *Tilton* v. *Beecher*, 59 N.Y. 176 (17 Am. R. 337).

The circuit court gave, in connection with others, the jury the following instruction:

"In order to entitle the plaintiff to recover in this action, he is required to prove to your satisfaction, by a fair preponderance of the evidence, a marriage in fact, or, in other words, an actual marriage by the plaintiff to the woman with whom it is alleged the criminal intercourse occurred, and previous to the time or period of the alleged criminal intercourse; that the defendant, at some one time and place, within the period alleged in this complaint (though no precise date or place where an act was committed need be proved), had sexual intercourse with the wife of the plaintiff. *If these facts are*

made out by the plaintiff's evidence to your satisfaction, then you should find for the plaintiff. In addition to these facts, however, the plaintiff may show the state of domestic happiness in which he and his wife had lived, previous to the time of the alleged criminal intercourse between her and the defendant, upon the question of the amount of damages he may be entitled to recover."

It is argued that this instruction was too narrow, and hence erroneous; that it required the jury, in determining whether the allegations of the complaint were sustained by sufficient evidence, to look alone to the evidence introduced by the plaintiff, regardless of what the evidence of the defendant may have tended to prove in his defence.

The instruction was obviously obnoxious to criticism in the respect indicated, but the peculiar phraseology objected to was presumably more injurious to the plaintiff than the defendant, and, when taken in connection with the context and other instructions given at the same time, ought to be construed as constituting a harmless error.

The instruction in question first informed the jury that certain enumerated facts had to be established to their satisfaction by a *fair preponderance* of the evidence to entitle the plaintiff to a verdict. The inquiry as to whether these enumerated facts were established by a preponderance of the evidence, necessarily involved the examination and consideration of all the evidence.

The jury were also told in different forms of phraseology, used in several subsequent instructions, that in coming to a conclusion it was their duty to consider all the facts and circumstances adduced at the trial. Suitable instructions were likewise given as to what the jury might consider in defence of the action as well as in mitigation of the damages. Under these circumstances, we feel it to be our duty to hold that the circuit court, in its use of the words "plaintiff's evidence," complained of as erroneous, had reference to all the facts and inferences upon which the plaintiff ostensibly relied for a re-

covery, and upon which he had a right to rely, in connection with the other evidence before the jury. As thus construed there was nothing in the instruction of which the defendant had any just reason to complain. At all events, we are unable to formulate any theory upon which the instruction, as it went to the jury, could have probably worked any injury to the defendant.

There was, in some respects, a sharp conflict in the evidence, and as applicable to that condition of the evidence the defendant asked the court to instruct the jury, that "If from the evidence you should find that any witness has sworn falsely and purposely, with a view to criminate the defendant, you may throw aside his whole testimony, except so far as it may satisfactorily be corroborated by other credible testimony."

The court refused to so instruct the jury, and complaint is made of the proceedings below in that respect.

"*Falsus in uno, falsus in omnibus,*" is an old and much used maxim as applicable to the law of evidence, and one to which frequent interpretations have been given by the courts. In the light of these interpretations, the maxim may be said to mean that where a witness swears falsely as to some material matter in a cause, the jury are at liberty to disregard his testimony in other respects, unless corroborated. A witness occupying such a position before a jury is, as to his credibility, very much in the attitude of an accomplice in crime, who has consented to testify as a witness for the State. But the rule so tersely illustrated by this maxim only applies to witnesses who have sworn falsely as to some *material* matter affecting the issue at the trial. 1 Greenl. Evi., section 461 and note; *Mercer* v. *Wright*, 3 Wis. 645; *Stoffer* v. *State*, 15 Ohio St. 47; Whart. Ev., section 412.

The instruction refused, failing as it did to make any reference to the materiality of the false testimony which might be held sufficient to totally discredit a witness, did not cor-

rectly state the rule as we have deduced it from the authorities, and was for that reason correctly refused.

There was no question in the cause, as it was given to the jury, which made the venue of any particular act of illicit intercourse material, except in so far as the place named might have served to distinguish one of such acts from another, while considering the evidence. It was, therefore, asking the jury to perform a work of supererogation when they were required to answer as to the places at which acts of illicit intercourse were, in their estimation, proven to have taken place, and the jury were justified in failing to answer as to such places. From what has been said on the subject of the motion to have the complaint made more specific, it follows, as a necessary inference, that the answer of the jury to the defendant's fourth interrogatory was sufficiently specific as to time.

The judgment is affirmed, with costs.

Filed March 7, 1884.

No. 11,207.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY COMPANY v. BURDGE.

RAILROADS.—*Pleading.—Negligence.—Personal Injury.*—In a suit against a railroad company by a passenger for personal injury, a complaint which alleges that the injury was the result of an act of the company's servant performed in a "*wilful*, reckless, careless and unlawful manner," and fails to aver that there was no contributory negligence by the plaintiff, is good on demurrer.

SAME.—*Wilful Injury.—Evidence.*—In such case, if there be no evidence tending to prove that the injury was wilful, the plaintiff can not recover.

From the Superior Court of Marion County.

C. W. Fairbanks, A. C. Harris and *W. H. Calkins*, for appellant.

E. A. Parker, for appellee.

BICKNELL, C. C.—The complaint of the appellee alleged that the plaintiff, who was a day laborer, took passage on one of the defendant's trains at the Western Elevator, west of White river, in Marion county, intending to ride thereon to the Union depot, in Indianapolis; that he paid his fare; that it was the custom of such passengers on said train, with the knowledge and consent of those in charge of the train, to ride upon the platforms outside of the car, and pay their fares there; that plaintiff, in accordance with such custom, and with such knowledge and consent, was standing on such a platform; that in the corporate limits of the city of Indianapolis, and while the speed of the train was more than ten miles an hour, the train was almost entirely stopped to give time for the adjustment of a switch, and that immediately after such adjustment the defendant's engineer on said train, in a wilful, reckless, careless and unlawful manner, let on such a volume of steam to the engine as caused said train to jump and jerk into immediate movement at a very high and unlawful rate of speed in said city, whereby the plaintiff, without his fault, was thrown violently to the ground and his collar bone was broken, and other personal injuries were by him sustained, to his damage $5,000.

A demurrer to this complaint, for want of facts sufficient, was overruled. The defendant answered by a general denial. A jury, at the special term, returned a verdict for the plaintiff for $250. The defendant's motion for a new trial was overruled; judgment was rendered on the verdict. The defendant appealed to the superior court in general term, assigning for error there the overruling of the demurrer to the complaint and the overruling of the motion for a new trial. The court, in general term, affirmed the judgment of the court in special term. The defendant appeals to this court, and assigns for error here the affirmance by the superior court in general term of the judgment at the special term. As the complaint charges a wilful injury, it presents no question as to contributory negligence. *Terre Haute, etc., R. R. Co.* v.

Graham, 46 Ind. 239; *Jeffersonville, etc., R. R. Co.* v. *Goldsmith*, 47 Ind. 43; *Evansville, etc., R. R. Co.* v. *Lowdermilk*, 15 Ind. 120. A railroad company may be liable for the wilful acts of its employees, within the scope of their employment. *Jeffersonville R. R. Co.* v. *Rogers*, 38 Ind. 116 (10 Am. R. 103); *Indianapolis, etc., R. R. Co.* v. *McClaren*, 62 Ind. 566. There was no error in overruling the demurrer to the complaint.

The principal question arising on the motion for a new trial is, was the verdict sustained by sufficient evidence? A verdict can not be disturbed where there is any competent evidence tending to support it. Under the allegations of the complaint here, there could be no recovery unless the injury were proved to have been wilful. We think there was no evidence tending to show a wilful injury.

The plaintiff testified: "After they run through into the east end of the bridge they slacked up to throw the switch; they did not stop right still; they stopped very near still; and as quick as the switch was turned they made a surge and went off with a quick start. I had my right hand hold of the rail as they made the surge, and it threw me off on this side of the switch. * * * * It stopped just all at once; you may say it started the same way; * * * it jerked every one that was on the train; * * * it gave the train a jerk, and throwed me off. I could not hold; it jerked so quick that it broke my hold and throwed me off on the side of the track. I was there a minute or two until I got up; it broke my collar bone, and I was hurt all through. There were three persons on the platform; nobody was thrown off but me; the train was then running at the rate of ten miles an hour." Upon cross-examination the following question was put to the plaintiff: "If I understand you, what you mean to say is, that the train came across the bridge at the rate of eight or ten miles an hour, and without slacking much, and then they put on steam and jumped off so rapidly as to loosen your hold of your hand on the platform rail and throw you

headlong into the ditch?" Answer. "Yes, sir." The foregoing was the testimony on behalf of the plaintiff as to the manner of the injury.

There was evidence on behalf of the defendant that the plaintiff told one Greiner, shortly after the accident, "that he wanted to get off at West street; the train slacked up and he was on the platform and wanted to get off, and just at the moment he was going to get off they pulled out at full speed, and the pull throwed him off." This conversation was denied by the plaintiff.

The foregoing testimony was all that gave a description of the manner of the injury. It certainly has no tendency to prove wilfulness. There is no element of wilfulness in it. *Indianapolis, etc., R. R. Co.* v. *McClure*, 26 Ind. 370. As it was necessary, under the allegations of the complaint, to prove a wilful injury, in order to recover, it follows that the verdict was not sustained by sufficient evidence. The court, therefore, erred in overruling the motion for a new trial. As this result will require the reversal of the judgment, we need not consider the other reasons for a new trial.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things, reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Filed March 8, 1884.

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No. 11,067.

DWIGGINS v. CLARK.

CONTRACT.—*Sale.—Delivery.—Tender.—Measure of Damages.—Pleading.*—A. contracted in writing with B. for the purchase of a monument, to be manufactured and put up at a future time, at a fixed price, payable on delivery. B. fulfilled the contract so far as A. would permit, but A. refused to allow him to do so; he was ready fully to comply, and so notified A.,

but the latter would not receive the monument or permit B. to put it up; and A. refused to comply with his agreement.

Held, that the complaint alleging these facts was good on demurrer.

Held, also, that the measure of damages, under the facts alleged, could only be the difference between the contract price and the market price at the time and place fixed for delivery; inasmuch as no delivery or tender was alleged, and no proof of facts not alleged could authorize greater damages.

PLEADING.—*Abatement.—Practice.*—Under R. S. 1881, section 365, if an answer in abatement be filed with paragraphs in bar, it may be stricken out, but sustaining a demurrer to it is not available error.

From the Montgomery Circuit Court.

H. M. Billings, *W. S. Moffitt*, *G. W. Paul*, *M. D. White* and *J. E. Humphries*, for appellant.

E. C. Snyder and *J. McCabe*, for appellee.

BLACK, C.—The appellee sued the appellant upon a written contract as follows:

"Milton Clark, Crawfordsville, Ind., agent for the White Bronze Monuments, manufactured at Bridgeport, Conn. June 24th, 1881. Wayne township, Montgomery county, Ind. Order and agreement for double front white bronze monument, No. 155, to be delivered at Waynetown in August, 1881, or as soon as convenient after it arrives here.

"I hereby agree, for value received, to pay Milton Clark or bearer four hundred and fifty dollars on delivery of one No. 155 white bronze monument, in accordance with the description of said No. 155 as per illustrated price list or photograph of said monument, the inscription or mottoes to be in raised letters as written on the back hereof, with such extensions or abbreviations as may be customary. If delivered according to this contract the purchaser further agrees that, in default of payment, it is specified in this contract said Milton Clark shall have the privilege of entering upon the grounds and removing the said monument without the consent of said ———. Witness my hand this 24th day of June, 1881." Signed by Mary Dwiggins.

On the back of this instrument were written the words,

"crown on top," and certain other words indicating devices and inscriptions.

It was alleged in the complaint that by direction of the defendant, by herself and through her agents after said contract had been executed, and by an understanding between the plaintiff and the defendant at the time of said execution that the mottoes and inscriptions should be sent to the plaintiff; he caused to be placed upon said monument certain mottoes and inscriptions, set out; that by request of the defendant the crown on the top of said monument mentioned in the endorsement on said contract was left off said monument; and a copy of directions in writing in regard to leaving off said crown and to the placing of said mottoes and inscriptions on the monument was set out.

It was alleged that the plaintiff, upon receiving said monument, notified the defendant and informed her that he was ready "to put it up in accordance with the terms of said agreement;" that she refused to receive it and to permit him to put it up; that he "has complied with all the terms and conditions of said contract on his part except in so far as he has been prohibited from so doing by the acts of the defendant and her agents, and that he is ready and willing in all respects to comply with the conditions of his said agreement; that plaintiff has demanded permission of the defendant and her agents to complete his part of the agreement, but has been and is now refused such permission; that defendant has wholly failed to comply with the terms of said agreement on her part, to plaintiff's damage $500. Wherefore," etc.

A demurrer to the complaint for want of sufficient facts was overruled, and this ruling is assigned as error.

The contract in suit was an executory contract for the sale of a chattel, no specific article in existence and ready for delivery being contemplated, but the contract being capable of performance by delivery of an article of a particular kind, which was yet to be wholly manufactured or to be selected and appropriated to this purpose, and to be in part manufactured.

The stipulated price was four hundred and fifty dollars, which was to cover the mottoes and inscriptions and certain devices to be placed upon the monument. The contract was changed so as to provide that the crown originally agreed upon for the top of the monument should be left off. Whether it was agreed that this was to make any difference in the price is not stated, it being merely shown that the crown was left off by request of the defendant.

In actions by the vendor based upon such contracts as this, the measure of damages arising out of the state of facts shown by the complaint, and, therefore, the nature of the cause of action, is controlled by the question whether upon the facts the title to the property is regarded as having passed to the buyer or as still remaining in the seller. In the former case the seller is entitled to recover the contract price; while in the latter case he may recover damages measured by the difference between the contract price and the market price at the time and place of delivery.

The cases elsewhere have not been harmonious upon this subject, but the question has been examined by this court, and the distinction between the two classes of cases clearly recognized.

In *Pittsburgh, etc., R. W. Co.* v. *Heck,* 50 Ind. 303 (19 Am. R. 713), it was said:

"It is conceived that in all cases of contracts for the sale of personal property, where it has any market value, the vendor, before he can recover of the vendee the contract price, must have delivered the property to the vendee, or have done such acts as vested the title in the vendee, or would have vested the title in him, if he had consented to accept it; for the law will not tolerate the palpable injustice of permitting the vendor to hold the property, and also to recover the price of it."

Among other quotations made in the course of the opinion, the following was quoted from *Ganson* v. *Madigan,* 13 Wis. 67: "Where the vendor has actually taken all the steps

necessary to vest the title to the goods sold in the vendee, he may sue for goods sold and delivered, and the rule of damages would be the contract price. But where he is ready and willing to perform, and offers to do so, but the vendee refuses, even though the title is not vested in the vendee, the vendor still has his action on the contract for damages. But the rule of damages in such case would be the actual injury sustained, which is ordinarily the difference between the value of the property at the time of the refusal, and the price agreed on."

The following was quoted from *Dustan* v. *McAndrew*, 44 N. Y. 72: "The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: 1. He may store or retain the property for the vendee, and sue him for the entire purchase price. 2. He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, 3. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price."

In *Indianapolis, etc., R. W. Co.* v. *Maguire*, 62 Ind. 140, it was held (citing *Pittsburgh, etc., R. W. Co.* v. *Heck, supra*,) that there could be no recovery by the seller of personal property as upon a sale and delivery, where there was no proof of anything done on the part of the plaintiff which divested him of his title or which restricted him in his control over the property. In *Fell* v. *Muller*, 78 Ind. 507, the same distinction was recognized.

In *Shawhan* v. *VanNest*, 25 Ohio St. 490 (18 Am. R. 313), the plaintiff had agreed with the defendant that for a certain sum the former would furnish the materials and make for the latter a carriage in accordance with the defendant's directions, and have it completed and ready for delivery at a certain place on a certain day. The plaintiff alleged that he had complied

with the contract on his part, and at the time stipulated had tendered the carriage to the defendant at the place appointed, and had requested him to accept and pay for it, which he refused to do. On the trial the evidence established the contract and the other averments of the petition, and showed that the plaintiff was still keeping the carriage subject to the defendant's order. It was held that the plaintiff was entitled to recover, as prayed in the petition, the contract price and interest thereon.

In *Hayden* v. *Demets*, 53 N. Y. 426, it was said: "Upon a valid sale of specific chattels, when nothing remains to be done by the vendor except delivery, whether conditioned upon payment or not, the right of property passes to the vendee, at whose risk it is retained by the vendor. The same consequence as to title results from a valid tender, upon an executory contract. Upon the refusal of the vendee to accept and pay the price, the vendor, upon proper notice, may sell the property and recover the difference, or he may sue for the difference between the contract and actual price, in which case he elects to retain the property as his own; or he may recover the contract price, in which case he holds the property as trustee for the vendee, and is bound to deliver it, whenever demanded, upon receiving payment of the price. In selling the property after tender and refusal, the vendor acts as the agent and trustee of the vendee, to whom the title is deemed to have passed by the tender. The right of the vendor to recover the price of the goods, if he chooses to risk the solvency of the vendee, necessarily results."

In *Smith* v. *Wheeler*, 7 Oregon, 49 (33 Am. R. 698), it was said: "The law, undoubtedly, is that where delivery of goods by a vendor at a particular place, and payment of the price by the vendee are concurrent acts, an actual delivery or tender of the goods at the place is necessary, in order to entitle the vendor to sue for the price, but there are exceptions to the rule." And the case then before the court was held to be an exception. There the plaintiffs were to manufacture certain

heavy machinery and deliver it to the defendants at a certain date on board the cars of a certain railroad, when the defendants were to receive it and pay the contract price. When the machinery was completed and ready for delivery, the defendants either neglected or refused to furnish the cars as they had agreed to do. It being impossible to make delivery or tender through the fault of the defendants, the plaintiffs were held to be excused from tender, and entitled to recover the contract price. See *Johnson* v. *Powell*, 9 Ind. 566.

In the case at bar, the thing to be delivered was of such a nature that in its manufactured form it could be of but comparatively small value to any person other than the defendant, and perhaps the case is one in which the rule permitting a recovery of the contract price should be carried as far as possible in favor of the seller. But under the contract the delivery of the monument at Waynetown, and the payment of the contract price, were to be concurrent acts. To entitle the plaintiff to the contract price, it was incumbent on him to proceed to the point of putting the title in the defendant, though the possession might remain in the plaintiff as trustee. He alleges that upon receiving the monument he notified the defendant, and informed her that he was ready to put it up in accordance with the terms of said agreement, and that she refused to receive it and to permit him to put it up; that he has complied with all the terms and conditions of said contract on his part, except in so far as he has been prohibited from so doing by the acts of the defendant and her agents; that he is ready and willing in all respects to comply with his said agreement; that he has demanded permission of the defendant and her agents to complete his part of the agreement, but he has been and is refused such permission.

It does not appear that he tendered the property to the defendant at the place appointed for delivery, or that it was impossible for him to make such tender, or that he was prohibited, prevented or excused by the defendant from making the tender. The contract made no requirement for him to

put up the monument or to do anything which mere prohibition would prevent.

He would have fulfilled his part of the contract by delivering the monument to the defendant at Waynetown. He would have put the title in the defendant and entitled himself to the contract price by a tender. *Schrader* v. *Wolflin*, 21 Ind. 238.

We think that the complaint does not show all the facts necessary to make a cause of action for the recovery of the contract price of the monument. It does not follow that it does not state facts sufficient to constitute a cause of action. It shows a breach of the contract by refusal to accept the monument which, without a passing of the title, was sufficient to support an action in which the measure of damages is the contract price, less the market value of the property at the place and time where and when it should have been accepted, or if there was no market at that place the measure of damages would be the difference between the contract price and the value of the property at the place of delivery, determined by the market value at some other reasonably convenient place, and the reasonable cost of transportation to that place. *Harris* v. *Panama, etc., R. R. Co.*, 58 N. Y. 660; *Cahen* v. *Platt*, 69 N. Y. 348 (25 Am. R. 203). Though the monument might have no market value in any place in its manufactured form, it does not follow that the material of which it was composed had no such value; and though this might be very small compared with the value as a monument, the defendant, by her refusal, and the plaintiff, by his failure to transmit the title from himself, would be confined to such a mode of ascertaining the value, the amount of which should be deducted from the contract price. This difference would be the damages naturally resulting from the breach, such damages as would be presumed to accrue, and might therefore be recovered under a general allegation of damages, such as was contained in the complaint. *Lindley* v. *Dempsey*, 45 Ind. 246; *Hadley* v. *Prather*, 64 Ind. 137.

The complaint, though not a good specimen of pleading, was not insufficient on demurrer.

There was an answer, consisting of several paragraphs, the first being a general denial. A demurrer to the fifth paragraph was sustained, and this ruling is assigned as error. This paragraph is called by counsel for appellant a plea in abatement, and the matter contained in it, if available for any purpose, could only be regarded, if well pleaded, as matter in abatement. The code of 1881, section 365, R. S. 1881, provides: "An answer in abatement must precede, and can not be pleaded with an answer in bar, and the issue thereon must be tried first and separately. If the issue be found against the answer, the judgment must be that the party plead over, and against him for all costs of the action up to that time."

The fifth paragraph, being pleaded with pleas in bar, might have been struck out on motion. An equivalent result was had by sustaining the demurrer, and there was, therefore, no available error.

A trial of the issues formed resulted in a verdict for the plaintiff for $400. Pending a motion made by the defendant for a new trial, the plaintiff filed a remittitur for $10 of the amount of the verdict. The motion for a new trial was overruled and judgment was rendered against the defendant for $390.

The amount of the verdict was arrived at by deducting from the contract price of $450 the sum of $50 as the price of the crown, which had been left off. There was evidence that it would cost about $10 to take the monument from Crawfordsville, where it had remained, to Waynetown and put it up; and perhaps the remittitur was made with reference to this evidence.

The court, upon its own motion, instructed the jury that if they should find for the plaintiff on the issues formed by the answer of general denial, the measure of his damages would be the difference between the contract price of the monument and its market value at the time and place fixed

for its delivery. This instruction was a correct statement of the measure of damages upon the cause of action stated in the complaint.

At the plaintiff's request, the court instructed the jury that if they believed from the evidence that the plaintiff, in pursuance of the contract sued on, procured the manufacture of what is known as a white bronze monument, corresponding with the specifications and description thereof in the contract sued on, and procured it to be shipped to Crawfordsville, Indiana, ready to be delivered to the defendant; and if they further believed that the defendant prevented the delivery of said monument, and that the plaintiff had ever since kept it, not as his own property, but for the defendant, ready at all times to deliver it pursuant to the contract, and was still ready and willing so to do, then the measure of the plaintiff's recovery, if the jury should find for him, should be the contract price of the monument.

The cause of action stated in the complaint determined the measure of the damages which might be recovered if the plaintiff should succeed.

In one instruction the court stated that the measure of damages, if the evidence should sustain the complaint, would be the difference between the contract price and market value; in the other the court told the jury that upon proof of certain facts the plaintiff might recover the contract price.

It is a familiar rule, often referred to by this court, that a plaintiff can not declare upon one theory and recover on another. A cause of action for the recovery of the contract price would be a different cause of action from one for the recovery of the difference between the contract price and the market value.

If the latter instruction could be understood as excusing the plaintiff from doing any act of those necessary to a transfer of title, it would be erroneous, without regard to the character of the complaint. We think, that, under the circumstances, it was susceptible of such construction by the jury.

But aside from this, the instructions were, in effect, contradictory and calculated to confuse and mislead the jury, and the latter admitted of a finding of damages not allowable under the complaint, and for the giving of it a new trial should have been granted.

Other questions discussed by counsel are such that they are sufficiently disposed of in what has been said, or such that they may not arise again. The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at appellee's costs, and the cause is remanded for a new trial.

Filed Mar. 8, 1884.

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94 59
126 218

94 59
155 633
156 86

94 59
162 276

No. 10,964.

DEARMOND v. THE PREACHERS AID SOCIETY ET AL.

HUSBAND AND WIFE.—*Judgment Lien.—Foreclosure of Mortgage.—Action to Set Aside Default.—Fraud.—Injunction.*—In an action by the mortgagee against a husband and wife and a judgment creditor of the husband, to foreclose a mortgage upon the real estate of the husband alone, executed by both him and his wife before such judgment had become a lien thereon, the judgment creditor, upon the promise of the mortgagee that judgment of foreclosure should be taken against both the husband and the wife, did not appear, but suffered default, whereupon the action was dismissed as to the wife, foreclosure was taken against the husband and the judgment creditor only, and the judgment provided that any surplus on the sale should be paid into court for the husband. Suit by the judgment creditor to set aside the default and to enjoin sale on said foreclosure, alleging the foregoing facts, and also alleging that a conspiracy had been formed between the mortgagee, the husband and his wife, and her father, by which, in order to defeat the claim of the judgment creditor, the share of the wife in the real estate should not be sold, and that any deficiency in satisfying the mortgage debt would be satisfied by the wife's father by paying such deficiency to the mortgagee.

Held, on demurrer, that the complaint was insufficient, and that no grounds lay for an injunction, as the wife had a right to save her interest in the land, the judgment of her husband's creditor not being a lien on her interest.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.
J. D. Miller and *F. E. Gavin*, for appellees.

COLERICK, C.—This was an action brought by the appellant against the appellees. A demurrer was sustained to the complaint, and the appellant refusing to amend final judgment on demurrer was rendered against him. The errors assigned are the ruling of the court upon said demurrer and the refusal of the court to grant a temporary injunction in the action.

The complaint, in substance, averred that the appellant held a judgment against James M. Burk, rendered in the Decatur Circuit Court on the 20th day of December, 1881, which was a lien on the interest of said Burk in certain real estate described in the complaint, upon which a prior mortgage, executed by said Burk and his wife Barthena Burk to the appellee, The Preachers Aid Society, etc., to secure the payment of a $600 note of said James M. Burk existed; that said society brought an action in said court to foreclose said mortgage, making the said Burks and the appellant parties defendants thereto, and that after the return day of the summons therein, and before the calling of said action, the attorney for said society assured the attorney of the appellant that he desired to take an ordinary judgment of foreclosure against the defendants, including the said Barthena Burk, and that the appellant's attorney, relying upon the faith of said representation, allowed the appellant to be defaulted in said action, and that afterwards the society dismissed said action as to Barthena Burk, and took a decree of foreclosure against the other defendants by default; that said decree was not publicly read in open court, and its contents were not known to the appellant or his attorney until after the close of the term. The complaint then avers that one Owens, the father of Barthena Burk, conspired and confederated with the said Burks and said society to prevent and hinder the appellant from collecting his judgment against

said James M. Burk, and to save from sale on a foreclosure of said mortgage the interest of Barthena Burk in said real estate, by making an agreement to the effect that if said society dismissed its action as to Barthena Burk, said Owens would pay to said society whatever sum the interest of James M. Burk in said real estate on sheriff's sale should fall short of paying said mortgage in full, which arrangement was not known to and was concealed from the appellant and his attorney, and that, in pursuance of said conspiracy, said parties caused to be inserted in the decree a provision that the surplus of the proceeds of the sale of said real estate remaining after paying said mortgage should be paid into court for said James M. Burk, and that, after the year allowed by the statute for redemption, the equity of redemption of all the defendants except Barthena Burk should be barred. It was also averred that said James M. Burk had no other property out of which said judgment could be made; that the interest of said Barthena was of the value of $400, and that her interest with that of James M. Burk would sell for a sum sufficient to pay said mortgage and the appellant's judgment in full; that execution had issued on said decree, and that the property had been advertised for sale, and would be sold to said Owens or to some person for him unless enjoined by the court. Wherefore he prayed for an injunction, and for an order requiring said society to foreclose said mortgage as to Barthena Burk, or that his judgment be paid from the proceeds of said sale, and other relief.

It is well settled by the decisions of this court that a party against whom a judgment by default has been rendered must seek relief under the last clause of section 396, R. S. 1881, which provides that the court "shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, * * * on complaint or motion filed within two years." See *Lake* v. *Jones*, 49 Ind. 297, and cases there cited. In *Lake* v. *Jones*, *supra*, which was a proceeding to set aside, on the ground of fraud,

a judgment which had been rendered by default, this court said: "The appellants, by their failure to appear and answer the complaint, admitted that the plaintiff had a cause of action and was entitled to a judgment for some amount. With this judgment against them, the appellants are in no condition to assail the judgment on the ground of fraud. Their default admits a cause of action. While the judgment by default stands, the appellants have no standing in court, except to move to set aside the default, and to be heard upon the assessment of damages." See, to same effect, *Briggs* v. *Sneghan*, 45 Ind. 14; *Fisk* v. *Baker*, 47 Ind. 534. The person applying to have a default set aside must show a meritorious defence before the court will determine the sufficiency of the reasons assigned by him for setting it aside. See *Buck* v. *Havens*, 40 Ind. 221, where it was held that "The practice very justly requires the party who seeks to be relieved from a judgment to show that he has a meritorious cause of action or defence, * * and this should be supported by his affidavit."

Tested by the rule established by this court in the cases above cited, the complaint in this case was insufficient. If the appellant desired and was entitled to have his judgment paid out of the surplus of the proceeds of said real estate remaining after paying said mortgage, it was his right to have appeared to the action and filed a cross complaint, setting up his judgment and asking that it might be so paid. Not having done so, and there being no other liens upon the property presented by way of cross complaint, the court properly ordered the surplus to be paid into court for the owner of the property. Upon proper application, the appellant may yet apply to the court to have his judgment paid out of said surplus, if any exists. The purpose of this action did not relate to such surplus, and no such relief was asked. The appellant being a party to said action the court properly adjudged that his equity of redemption should be barred after the time allowed by law for redemption. If a judgment of foreclosure had been rendered against both James

M. Burk and Barthena Burk, and the court had ordered the interests of both of them in said real estate to be sold, like provisions for the payment of said surplus into court for them, and barring the equity of redemption of the appellant would, undoubtedly, have been made, as the court, by the default of the appellant, could have made no other order. If the appellant had appeared to the action and filed a cross complaint therein, he could not have caused the interest of Barthena Burk in said real estate to be sold to pay his judgment, as it was not a lien thereon. It existed against her husband alone, and his interest only in said real estate was liable for its payment. *Taylor* v. *Stockwell*, 66 Ind. 505. Nor could he have prevented her from obtaining an order requiring the interest of her husband in said real estate to be first sold to pay said mortgage before selling her interest. See *Leary* v. *Schaffer*, 79 Ind. 567, where it was held by this court that a wife joining with her husband in the execution of a mortgage upon real estate owned by him has an equity of sufficient strength to entitle her to require the mortgagee to first offer for sale the part of the land in which she has no interest before resorting to that in which she has an interest.

If, prior to the commencement of the action to foreclose said mortgage, the appellant had purchased the interest of James M. Burk in said real estate at a sale thereof, under an execution issued upon the judgment in his favor, and thereby acquired title thereto, still Barthena Burk would have been entitled to an order in said action directing said interest to be first sold to pay the mortgage. *Medsker* v. *Parker*, 70 Ind. 509.

The appellant had a lien on the interest of James M. Burk in said real estate, subject to said mortgage, and on that alone. The mortgagee only could have insisted upon the sale of the interest of Barthena Burk in said real estate to pay said mortgage. The agreement that was made to protect from sale her said interest was one that the parties thereto had the right to make, and did not affect the rights of the appellant.

The fact that the judgment was not publicly read in open

court did not impair its validity. The provision of the statute relating to the reading of judgments, etc., in open court, is merely directory. *Jones* v. *Carnahan*, 63 Ind. 229.

We think that the complaint was insufficient, and, therefore, no error was committed in sustaining the demurrer thereto. If the complaint was insufficient, the court properly refused to grant a temporary injunction in the action. If it had been granted, it would have been dissolved by the final judgment that was rendered. Even if error was committed in its refusal, it was a harmless one. See *Wood* v. *Rice*, 68 Ind. 320, where it was said by this court: "We may observe, in reference to the error first assigned, that, if a temporary injunction had been granted, it would have been dissolved by the final judgment rendered for the defendants upon the finding for them; therefore, if the finding and judgment were correct, no possible legal harm accrued to the appellant by the refusal of the court to award such temporary injunction. The temporary injunction could only have been useful to the appellant in order to stay the sale until the question, whether he was entitled to a perpetual injunction, could be tried; and, that question having been decided against him, it is apparent that he lost no legal right in not obtaining the temporary injunction." There being no error in the record the judgment must be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed March 8, 1884.

94	64
138	92

94	64
149	436
150	314

No. 10,822.

DARKIES ET AL. *v.* BELLOWS.

PARTIES.—*Joint Plaintiffs.—Demurrer.*—A complaint by several jointly, which fails to show a joint cause of action in all, is bad on demurrer for the want of sufficient facts.

QUIETING TITLE.—*Complaint.—Sheriff's Sale.—Life-Estate.*—A complaint to quiet title against a claim of title by the defendant founded upon a

sheriff's sale, which alleges merely that the interest of a tenant for life was sold by the sheriff, without averring that the plaintiff's remainder in fee was *not* also sold, is bad on demurrer.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellants.

J. G. Howard, J. F. Read and —— *Stannard*, for appellee.

FRANKLIN, C.—Mahala Darkies, Andrew J. Darkies, Alice S. Long and Isaac Long (her husband), commenced this action against the defendant, Thomas Bellows, to quiet their title to a certain eighty-acre tract of land. There was a demurrer sustained to the complaint. The only error assigned is upon that ruling. The complaint substantially alleges that appellants Andrew J. Darkies and Alice S. Long are the owners in fee simple subject to a life-estate in Mahala Darkies, which life-estate she owns in the land (which is described in the complaint), but they are not in the possession thereof, the same being in the possession of the appellee. "That they hold and claim title thereto in the following manner: On October 21st, 1864, the said defendant, Thomas S. Bellows, and his wife, in consideration of the sum of $550, of which $500 was paid to said Bellows on said day in cash, conveyed the said tract of land to one Elisha W. Darkies and the plaintiff Mahala Darkies, his wife, during their joint lives, and upon the death of the said Elisha W. Darkies and Mahala Darkies, then the said plaintiffs Andrew J. Darkies and Alice S. Long were to have and to hold the said premises as tenants in common, to themselves, their heirs and assigns forever. For the payment of the residue of said purchase-money, viz., $50, the said Elisha W. Darkies executed his note, bearing date October 21st, 1864, payable twelve months after date, and to secure the same a lien was retained by the said Bellows on the interest of the said Elisha W. Darkies in the said premises; afterwards, on the 12th day of October, 1871, by the consideration of the Clark Circuit Court of In-

diana, in a suit wherein the said Thomas S. Bellows was the plaintiff, and these plaintiffs and the said Elisha W. Darkies were defendants, the said Bellows recovered of the said Elisha W. Darkies the sum of $44.75, and the said real estate was ordered to be sold to pay the said sum; and afterwards, on the 6th day of January, 1872, the said defendant, Bellows, purchased the said interest of the said Elisha W. Darkies from the sheriff of Clark county at a sale upon execution on the said judgment; afterwards, on the 1st day of January, 1880, the said Elisha W. Darkies died intestate at said county. And the said plaintiff Mahala Darkies has conveyed all her interest in the said premises above described to her co-plaintiffs before the commencement of this suit. And the said defendant, by reason of his said pretended title under said sheriff's deed, claims to own the said real estate, and the said claim is a cloud upon the title of these plaintiffs which ought to be removed. Wherefore," etc.

The sufficiency of this complaint is called in question, first, for the reason that it does not show any cause of action in one of the plaintiffs Mahala Darkies. This reason is well stated. While the complaint starts out by alleging that this plaintiff owned a life-estate in the premises, in stating upon what they base their claim, they allege that before the commencement of this suit she had conveyed all her interest in the premises to her co-plaintiffs. If so, how can she have any right to bring the suit? The complaint, instead of showing a cause of action in her, shows that she had no cause of action. The demurrer was for the reason that the complaint did not state facts sufficient to constitute a cause of action. Where two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, a demurrer will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action. *Berkshire* v. *Shultz*, 25 Ind. 523; *Goodnight* v. *Goar*, 30 Ind. 418; *Lipperd* v. *Edwards*, 39 Ind. 165; *Maple* v. *Beach*, 43 Ind. 51; *Parker* v. *Small*, 58 Ind. 349; *Harris* v. *Harris*, 61

Ind. 117; *Stephenson* v. *Martin*, 84 Ind. 160; *Martin* v. *Davis*, 82 Ind. 38.

It is further insisted that, as the complaint avers that the land was ordered to be sold for the payment of the debt, in order to be good it ought to show that the plaintiff's interest was not sold by the sheriff; that it was only Elisha's interest that was sold. The simple allegation that Elisha's interest was sold is not inconsistent with the fact that the plaintiff's interest might also have been sold in pursuance of the order of the court.

We think that the complaint, for the reasons above stated, was insufficient, and that there was no error in sustaining the demurrer to it. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed March 8, 1884.

No. 10,381.

94 67
127 102
94 67
129 361
94 67
139 125

LOSEY ET AL. *v.* BOND, TRUSTEE, ET AL.

PRACTICE.—*Pleading.*—The overruling of a motion to strike out part of a pleading does not constitute an available error.

SAME.—*Judgment.*—An error in sustaining a demurrer to an answer in bar of a personal judgment is not an available error, where no such judgment is rendered.

MARRIED WOMAN.—*Infancy.—Conveyance of Real Estate.*—An infant *feme covert* may convey or encumber her lands, in this State, by deed or mortgage in which her husband joins.

SAME.—*Disaffirmance of Conveyance.*—Such deed or mortgage is voidable, and may be affirmed or disaffirmed by such person after she attains full age.

SAME.—*Disaffirmance, How Made.*—An infant's conveyance of land in this State is disaffirmed by the execution of a deed of such land to another after such infant attains full age.

SAME.—*Affirmance of Conveyance.—Mortgage.*—An infant's mortgage of land in this State is affirmed by the execution of a deed of such land to another after such infant attains full age, when such deed recites that the conveyance is made subject to such mortgage.

From the Superior Court of Marion County.

J. Hanna, F. Knefler and *J. S. Berryhill,* for appellants.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and *E. Daniels,* for appellees.

BEST, C.—Jonathan Edwards, trustee of the Equitable Trust Company of New London, Connecticut, brought this action against the appellants to foreclose a mortgage, and since the case has been appealed to this court, his death has been suggested, and Henry R. Bond and others have been substituted as appellees.

The complaint averred, in substance, that the appellee, on the 1st day of August, 1874, loaned to Robert G. Losey $3,000, payable five and one-half years after date, with ten per cent. interest, evidenced by three certain bonds of $1,000 each, with coupons for the interest, payable semi-annually, thereto attached, and to secure the same Emma J. Losey and Robert C. Losey, her husband, executed to the appellee a mortgage upon her real estate in the complaint described; that Emma J. Losey and her husband, on the 7th day of April, 1875, by warranty deed, conveyed said real estate to Marquis D. Losey, and by said deed "it was provided that said grantee took said real estate subject to the payment of the mortgage of the plaintiff;" that said Marquis D. Losey and his wife, on the 15th day of February, 1876, by warranty deed, conveyed said real estate to Margery Losey; that Margery Losey, on the 15th day of May, 1876, by warranty deed, conveyed said real estate to William S. Losey, and that said William S. Losey and wife, on the 28th day of October, 1878, by quitclaim deed, conveyed said real estate to said Emma J. Losey; that said Emma J. Losey claims that she was born on the 7th day of January, 1854, and by reason thereof she is not bound by said mortgage. But he avers that if such is the fact, though he denies it, she can not now assert such defence against him as the conveyance of such real estate by her after she was more than twenty-

one years of age as stated, operated as an affirmance of such mortgage; that said bonds with the several coupons thereto attached are due and remain wholly unpaid; that the other defendants claim some interest in said premises, etc. Wherefore, etc.

Robert C. Losey filed an answer of three paragraphs. The first was subsequently withdrawn, a demurrer was sustained to the second and a reply in denial of the third was filed.

Emma J. Losey made an unsuccessful motion to strike out a portion of the complaint, after which she filed an answer of four paragraphs. A demurrer was sustained to the first, which alleged her minority at the time she executed the mortgage, and a reply in denial of the others was filed.

The other defendants were defaulted, the issues thus formed were tried by the court, and, over a motion for a new trial, judgment was rendered for the appellee.

The appellants appealed to the general term, where the judgment was affirmed, and from such judgment this appeal has been taken.

The assignment of error questions the various rulings made during the progress of the cause, and these will not be considered.

The second paragraph of Robert C. Losey's answer merely alleged his discharge in bankruptcy in bar of a personal judgment against him. No such judgment was rendered, and hence such ruling was harmless, if erroneous. *McCoy* v. *Monte*, 90 Ind. 441.

The refusal of the court to strike out a portion of the complaint is not an available error as has frequently been decided. *Hay* v. *State*, 58 Ind. 337; *Cox* v. *Bird*, 65 Ind. 277.

The question presented by the ruling in sustaining the demurrer to the first paragraph of the answer of Emma J. Losey is whether her subsequent conveyance of the property as stated amounted to an affirmance of the mortgage. This is the controlling question in the case.

It is well settled that an infant *feme covert* may convey her

lands in this State by deed in which her husband joins. *Hartman* v. *Kendall*, 4 Ind. 403; *Johnson* v. *Rockwell*, 12 Ind. 76; *Scranton* v. *Stewart*, 52 Ind. 68. She may likewise encumber them by mortgage. It is also well settled that such deed or mortgage is voidable, and may be affirmed or disaffirmed by such person after she attains full age. *Law* v. *Long*, 41 Ind. 586; *Dill* v. *Bowen*, 54 Ind. 204.

The disability of coverture neither hinders her from disaffirming nor shields her from the consequences of affirming such conveyance or incumbrance. *Miles* v. *Lingerman*, 24 Ind. 385. In this respect she labors under no disability.

It is also well settled that an infant's conveyance of land in this State is disaffirmed by the execution of a deed of such land to another after such infant attains full age. *Pitcher* v. *Laycock*, 7 Ind. 398; *Riggs* v. *Fisk*, 64 Ind. 100.

This rule proceeds upon the ground that the last conveyance is entirely inconsistent with the first, and as the last is operative the first is disaffirmed.

This is not the rule, however, where the former conveyance was by way of mortgage. Such conveyance in this State only creates a lien, and a subsequent conveyance of the equity of redemption is not necessarily inconsistent with the lien created by the mortgage. It may be entirely consistent with such encumbrance. Its effect depends upon its terms, as it may or may not affirm or disaffirm the mortgage.

In this case it is not insisted that the mere conveyance of the land affects the question one way or the other, but it is insisted that as such conveyance, by its terms, was made subject to the payment of the mortgage, the conveyance of the land by the execution of such deed operated as an affirmance of the mortgage. The mere recital of the mortgage in such conveyance, it is said, is such recognition of its existence as amounts to its ratification. This position is not unsupported by authority.

In 1 Parsons on Contracts, p. 326, it is said, that whether an infant's verbal declarations can ratify his instrument under

seal may not be certain, "but it is quite certain that if, in an instrument under seal, a person recites or refers to a former instrument also under seal, made while he was a minor, this is a ratification of the first."

In *Boston Bank* v. *Chamberlin*, 15 Mass. 220, it was held that where an infant made a mortgage of his land, and after coming of age, conveyed the same land to another, subject to the mortgage, such conveyance was a confirmation of the mortgage.

In *Allen* v. *Poole*, 54 Miss. 323, it is said that if an infant makes a mortgage, and after he arrives at age conveys the land subject to the mortgage, such conveyance confirms the mortgage.

In *Merchants' Fire Ins. Co.* v. *Grant*, 2 Edw. Ch. 544, it was held that where an infant executed a mortgage, and after attaining full age, made a will providing that all his debts should be paid, such direction evinced an intention to pay the debt, and operated as a confirmation of the mortgage.

In *Phillips* v. *Green*, 5 T. B. Mon. 344, it was held that where a person of full age conveys a portion of property in pursuance of an arrangement to convey all, and in such deed recites a conveyance made of the residue while a minor, such reference amounts to a confirmation of such conveyance.

These references show that the mere recital of such encumbrance in a subsequent conveyance is such recognition of its continued existence as amounts to an affirmation of its validity, and in the light of these authorities it would seem that the stipulation in appellant's deed must be deemed a confirmation of the mortgage.

In addition to this, it will be observed that the stipulation in this deed is not a mere recital of the continued existence of the mortgage, but it makes a distinct and independent provision for its payment. The stipulation is that the vendee takes the property subject to the payment of the mortgage. This is a provision for its payment. The means with which to make it are placed in the vendee's hands, and the duty is

imposed upon him to satisfy the mortgage out of the property. Having accepted the conveyance, with this stipulation, he can not dispute the validity of the mortgage nor resist the collection of the debt from the property. *Freeman* v. *Auld*, 44 N. Y. 50; *Hill* v. *Minor*, 79 Ind. 48.

This stipulation may not impose a personal obligation upon the vendee to pay the mortgage, but it created the relation of principal and surety between the parties, and if thereafter, and before the reconveyance, the mortgagors had paid the debt, they would have been entitled to be subrogated to the rights of the mortgagee, and to enforce the same against the property. *Josselyn* v. *Edwards*, 57 Ind. 212; *Figart* v. *Halderman*, 75 Ind. 564; *Hill* v. *Minor*, *supra*.

The right reserved to resort to the property, and the provision thus made for its payment, fixed the mortgage as a charge upon the land, and this, as we think, necessarily operated as a confirmation of the mortgage.

The demurrer was, therefore, properly sustained, and as the motion for a new trial presents no other question, it was properly overruled.

There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellant's costs.

Filed March 8, 1884.

No. 10,839.

94 73
137 557
94 72
133 47

BOARD OF COMMISSIONERS OF PORTER COUNTY *v.* DOMBKE.

COUNTY COMMISSIONERS.—*Pleading.*—Formal pleading is not necessary in presenting claims in the court of county commissioners, and a claim is sufficient if it fully apprise the board of the nature of the claim, and state it with such certainty that a judgment upon it would bar another suit for the same cause.

NEGLIGENCE.—*Personal Injury.—Evidence.—Res Gestæ.*—In a suit for personal injury resulting from negligence, what is said at a time of suffering as to the character of the pain or hurt is admissible for the plaintiff, not extending to a narrative of a past transaction.

SAME.—*Bridges.—Evidence.—Highway.*—In a suit against a county, on account of injuries resulting from a defective bridge, evidence of the condition of the highway connecting with the bridge, and the frequency of its use by travellers, is admissible, so that the jury may have knowledge of the place where the injury occurred.

SAME.—*Damages.*—In a suit for injury caused by negligence, the state of the injury as it exists at the time of trial may be shown, and damages may be given for permanent injury.

SAME.—*County Commissioners.—Care of Bridges.*—Ordinary care is required of a county in constructing and maintaining its bridges, that is, such care as a prudent man would use in his own affairs where the whole risk would be his own, and the degree of this care must be in proportion to the magnitude of the injury likely to result from neglect.

SAME.—*Notice.*—In such cases actual notice of defects is not essential to liability, but their existence for such a period that they ought to have been discovered will be sufficient.

SAME.—The use of a bridge by one who knows its defects does not forbid his recovery for injury if the danger be such that it could be prudently encountered, and if he use care proportioned to the known danger.

LEADING QUESTIONS.—The permission of leading questions is not available error, unless it is plain that there was an abuse of discretion to the injury of the party objecting.

From the Porter Circuit Court.

W. Johnston, for appellant.

E. D. Crumpacker and *J. H. Gillett*, for appellee.

ELLIOTT, J.—The appellee filed a verified claim in the form of a complaint before the board of commissioners of Porter county, alleging that he had received injuries because of the negligence of the county authorities in suffering a bridge of the county to become unsafe. The decision of the board was against him, and he appealed to the circuit court and recovered judgment.

No attack was made on the complaint until after verdict in the circuit court, when the appellant moved in arrest of judgment. It is objected to the complaint that it does not show that the injury occurred without the negligence or fault of

the appellee. We are not altogether clear that the objection is not ill in point of fact, for there are facts stated which inferentially show that the injury was attributable solely to the negligence of the appellant. But we do not deem it necessary to pass upon that question.

It will be observed that the complaint was filed in the commissioners' court, and our decisions establish the rule that no formal pleadings are necessary in such cases. In the case of *Board, etc.*, v. *Ritter*, 90 Ind. 362, the question is thoroughly discussed and the cases reviewed, and it is held that the rules of pleading which prevail in the courts of superior jurisdiction do not apply to complaints in the commissioners' court. In the complaint before us there are facts sufficient to fully apprise the appellant of the nature of the appellee's claim, and to so fully exhibit the character of the controversy as to make a judgment on it a bar to any other action for the same cause. We are satisfied that, under the decision in the case cited and the many decisions there referred to, the complaint is good.

Where a person is suffering from an injury caused by another's negligence, it is proper to prove what was said at the time concerning the character of the pain or hurt. It is not, however, competent to give a narrative of a past occurrence. It was competent to show the character of the highway and its frequent use by travellers at the place where it connected with the bridge. It was competent for the purpose of enabling the jury to get an accurate knowledge of the place where the injury occurred.

Judgments are not reversed because the trial court permits leading questions to be put to a witness, unless it clearly appears that there was an abuse of discretion working injury to the complaining party. In the present case there was no abuse of discretion.

A person injured by the negligence of another may show the character of the injury as it exists at the time of the trial. It is settled law that a plaintiff in such a case may recover for injuries of a permanent character.

The trial court did right in directing the jury that the county was charged with the duty of maintaining its bridges in a reasonably safe condition for travel. *Board, etc.*, v. *Legg*, 93 Ind. 523. It is true that a county is not an insurer of the safety of its bridges, but it is also true that the county is bound to use ordinary care and diligence in constructing and maintaining them.

The definition of ordinary care given by the court is that approved by the authorities. It is in these words: "What constitutes ordinary diligence depends largely on the circumstances of the given case. The general rule of law, however, is that ordinary diligence is that degree of care and prudence which a discreet and cautious person would use in his own affairs were the whole loss or risk to be his own. And this degree of care should be reasonably proportioned to the magnitude of the injury likely to result from the neglect."

The instruction on the subject of notice to the county is unobjectionable. It is not essential that the county officers should have actual notice of the unsafe condition of the bridge, but if the defect has existed such a length of time as that they ought to have taken notice of it, the law will charge them with notice.

What is such a length of time as will charge public officers with notice of a defect in a bridge or highway must, in a great measure, depend upon the circumstances of the particular case, and must, in most cases, be a question of fact to be submitted, under proper instructions, to the jury. It is obvious that a greater length of time should be required in cases of country bridges than in cases where the bridge belongs to a town or city, because it can not be expected that the same oversight can be maintained by county officers whose jurisdiction extends over a large extent of territory, as by city or town officers whose jurisdiction is over a limited territory compactly settled, and who are much better provided with means for ascertaining defects in bridges than county officers.

The court erred in instructing the jury as to the effect of the appellee's knowledge of the unsafe condition of the bridge, but the error was in favor of the appellant. It is quite well settled that a person who knows of the dangerous condition of a bridge or highway may, if the danger is not of such a character that a prudent man would not encounter it, use the bridge in a proper manner, but if he does undertake to use it, he must exercise care proportioned to the known danger. *Board, etc.*, v. *Legg, supra; Nave* v. *Flack*, 90 Ind. 205; *Murphy* v. *City of Indianapolis*, 83 Ind. 76; *City of Huntington* v. *Breen*, 77 Ind. 29; *Toledo, etc., R. W. Co.* v. *Brannagan*, 75 Ind. 490; *Palmer* v. *Dearing*, 93 N. Y. 7.

We can not examine the instructions said to have been asked by the appellant. There are two reasons for this conclusion: 1st. It does not appear that they were asked at a proper time; 2d. They are not in the record except as embodied in the motion for a new trial, and are not properly before us.

Judgment affirmed.

Filed March 8, 1884.

No. 10,638.

BEATTY v. BRUMMETT.

94 76
155 602

94 76
160 668

94 76
170 76

94 76
171 699

MORTGAGE.—*Contract.—Sheriff's Sale.—Redemption.—Consideration.—Promise.*—Where, to secure a loan of money to the execution defendant for the purpose of satisfying the judgment, by parol agreement, the lender takes a sheriff's deed of the borrower's land, in pursuance of a purchase by him upon the execution sale, the transaction constitutes a mortgage in equity, and a subsequent release of the borrower's rights in the land is a sufficient consideration for a promise to pay money.

INSTRUCTIONS.—*How Requested.*—Instructions requested, which are not signed by the party asking them, or by his attorney, may be refused without error.

From the Brown Circuit Court.

F. T. Hord and *W. B. Hord*, for appellant.

G. W. Cooper, for appellee.

BLACK, C.—The appellee sued the appellant. A demurrer to the complaint, for want of sufficient facts, was overruled.

The complaint showed, in substance, that the appellee, on the 1st of September, 1874, intermarried with one Martin Beatty; that she then owned eighty acres of land in Brown county, which, subject to a mortgage thereon to one Dubois, she held in virtue of a previous marriage; that on the 1st of November, 1875, said Dubois took a judgment of foreclosure of said mortgage, in the sum of $261.25, with costs, in the Brown Circuit Court, and on the 3d of June, 1876, said land was sold by the sheriff, under the decree of foreclosure, for $305.81; that the appellant was the son of said Martin Beatty and step-son of the appellee; that she reposed great confidence in him; that on the day of said sale she had not the money to pay said debt; that the land was worth $1,000; that she was able to raise all the money necessary to pay the debt except $80, and she did raise said money, the sum of $225.81, and gave it to the appellant for the purpose of bidding in said land for her benefit; that it was agreed between the appellee and the appellant, that he would take her said sum of $225.81, and supply said sum of $80 necessary to make the full amount of the debt out of his own moneys; that he would attend said sale and bid the full amount of said debt, and that, to secure him for the repayment of his said $80, the certificate of purchase should be made to him, but that it should only be held by him as such security.

It was alleged that he advanced said money, as agreed; that she did not attend the sale, but relied solely on her agreement with him; that he, intending to buy said land for himself, and to defraud and cheat her out of said land, attended the sale, bid in said land, paid said $80 of his own money and said money provided by her, and took the certificate in his own name; that she continued to live on said land, and he agreed with her to hold said certificate as security merely for the money so advanced by him, and that she might continue to occupy said premises as her own until she could sell the

same and thus raise the money to repay him; that, "under said agreement," she failed to redeem said land within the time provided by law, and he, with her agreement, at the expiration of one year from said sale, received a sheriff's deed for said land in his own name, he agreeing with her to hold the land for sale, and that when a purchaser should be found therefor the appellant should have his $80, with interest, and she should have the residue; that afterward, while she was so in possession of said land, he sold it to Peter Isenogle and Charles E. Long, for the sum of $800; that at the time of said sale, on the 9th of March, 1880, she was still in possession of the land, and owned it subject to said lien for $80, with interest thereon due the appellant; that she refused to surrender said premises to the appellant or to his said grantees, and claimed the same, subject to the appellant's said lien; that, to settle and compromise her claim and interest held at the time of appellant's said sale, he agreed with her that if she would surrender her claim and interest in the land and the possession thereof to his said grantees, he would pay her the sum of $500; that she consented to said sale, surrendered her right and interest in and to said property, and gave up the possession thereof to said grantees; but that appellant had failed and refused, and still failed and refused, to pay said sum of $500, for which she demanded judgment.

It is insisted in argument that the agreement for the payment of $500 was without consideration, because, as is supposed by counsel, the appellee at the time of the appellant's promise to pay that sum had no interest in the land or right of possession, but was a mere tenant at sufferance, it being contended that the verbal agreement in relation to the sheriff's sale could not create a trust in her favor or confer on her any interest in the land.

The averments of the complaint show that the land sold by the sheriff was the property of the appellee, and that she, through the appellant, paid the purchase-money, a portion

thereof being provided by the appellant by way of loan, and that he took the title in his name, under an agreement to hold it as security for the payment of the debt thus created. The allegation in regard to a fraudulent purpose on the part of the appellant was not necessary. The doctrine is well established in this and a majority of the other States, that a deed of conveyance of land absolute on its face, without any other written agreement, may in equity, without showing any fraud, mistake or accident in its execution, be shown by parol evidence to have been intended as a security for the payment of a debt, and thus be proved to be, in truth, a mortgage, as between the parties, and as against those who have derived title through the grantee who are not purchasers in good faith, for value and without notice; and such persons have the rights, liabilities and remedies incident to the relation of mortgagor and mortgagee. This doctrine has long been recognized in this State. See *Hayworth* v. *Worthington*, 5 Blackf. 361 (35 Am. Dec. 126); *Butcher* v. *Stultz*, 60 Ind. 170; *Smith* v. *Brand*, 64 Ind. 427.

In such cases the grantee holds the title as a mortgagee in equity.

Upon the principle that the statute of frauds can not be invoked to protect a party in the perpetration of a fraud, on which is based the doctrine of specific performance in equity, it was said in *Levy* v. *Brush*, 45 N. Y. 589, that when a party whose lands were about to be sold by judicial sale has agreed with another to loan him money and bid off and hold the land as a security for the money, and the agreement has been consummated, the party so acquiring the title has been regarded as holding it as a mortgagee in equity. And it was said that upon these grounds *Ryan* v. *Dox*, 34 N. Y. 307, was decided.

In *Ryan* v. *Dox*, *supra*, it was held admissible to prove that the defendant purchased, under a foreclosure sale, upon a verbal agreement that the purchase should be for the bene-

fit of the plaintiff, the mortgagor, and that the defendant should take the deed of the master and hold the premises in his own name by way of security for what money he should advance and pay on the purchase, and that whenever the plaintiff should repay him such amount, with interest and reasonable compensation, the defendant should convey the premises to the plaintiff. See, also, *Case* v. *Carroll*, 35 N. Y. 385; *Stoddard* v. *Whiting*, 46 N. Y. 627.

In *Carr* v. *Carr*, 52 N. Y. 251, in speaking of a deed of conveyance absolute on its face, but intended as a mortgage, it was said: "It is not material that the conveyance should be made by the debtor or by him in whom the equity of redemption will exist. It is sufficient if the debtor and he who claims to occupy the position of mortgagor with the right of redemption, has an interest legal or equitable in the premises, and the grantee of the legal title has and acquired such title by the act and assent of the debtor, and as a security for his debt."

In *Sweet* v. *Mitchell*, 15 Wis. 641, it is said: "It is frequently the case that parties desire to give security upon lands the title to which is not in them, but is subject to their control. It is also frequently that they desire to give it upon lands owned by them, but liable to be sold on judicial proceedings against them. The rule itself being once established, that parol evidence may be admitted to show an absolute deed a mortgage, when such an agreement is clearly established, we do not think it material whether a judicial sale was adopted merely as a means of conveying the title to the mortgagee, or whether it was conveyed to him by some third party for and on account of the mortgagor. These circumstances furnish no substantial grounds for distinguishing the case from a direct conveyance from the mortgagor, and the cases which have established the rule do not make any distinction." See, as illustrating the case at bar, *Stephenson* v. *Arnold*, 89 Ind. 426; *Ayers* v. *Slifer*, 89 Ind. 433; *Butt* v. *Butt*, 91 Ind. 305; *Rector* v. *Shirk*, 92 Ind. 31.

The relation between the appellee and the appellant was that of mortgagor and mortgagee, and by her surrender to his grantees she lost her equitable rights in the property. This was a sufficient consideration for his promise to pay her the sum of $500. Under the facts stated, she compromised to her loss, but it is only to uphold her contract that we are concerned. There was no error in overruling the demurrer to the complaint.

There were five paragraphs of answer. The first was a denial; the second alleged payment; the third set up the statute of limitations; the fourth alleged that the contract sued on was without consideration; a demurrer to the fifth was sustained. If it contained any allegations that were not merely conclusions of law, they were available under other paragraphs of the answer. Counsel for appellant dismiss the fifth paragraph of the answer by referring to their discussion of the demurrer to the complaint, and we may dismiss it without further remark.

The appellee replied by denial. The cause, having been commenced in the Bartholomew Circuit Court, was tried there by a jury, the verdict being in favor of the appellee. A new trial having been granted, the venue was changed to the Brown Circuit Court, where a trial by jury again resulted in a verdict for the appellee for $500. A motion for a new trial was overruled.

It appeared in the evidence that the appellant provided about $80 of the purchase-money, and that the remainder, about $225, was provided by his father. The appellee's theory was that the portion so provided by the father was her money; while the appellant claimed that it belonged to the father, and that it was the purpose of the father and son to get the title of the land for the latter, so that the children of the appellee by a former marriage should not have it, and that for this reason the father let the land go to sale instead of paying the judgment.

The appellant complains of some of the instructions on the ground that the court did not therein require, for the appellee's recovery, that the jury should find that the money provided by the father belonged to the appellee.

The court did require, in various forms, that for the plaintiff's recovery the jury should find that the defendant made a loan to the plaintiff, and that the certificate was taken and held as security for the payment of such loan. The court told the jury that if they found that no agreement was made by and with the plaintiff to lend or advance her or for her benefit any money to make the purchase of the land, they must find for the defendant; also, that if they found that the defendant did not agree with or for the plaintiff to lend or advance for her benefit any sum of money to make the purchase of the land under the mortgage sale and to take and hold the certificate as security for such sum only, they must find for the defendant; also, that if they found that the father had in his hands no money or means of the plaintiff, they might consider this as a circumstance tending to disprove an arrangement with the defendant to furnish a portion of the purchase-money as a loan for her benefit; also, that if the fact that the father furnished a portion and the defendant a portion was satisfactorily explained under some other hypothesis contradicting such an arrangement, then these facts could not be regarded as confirmatory circumstances.

If it was true that the appellant, under an agreement with the appellee, provided a sum of money for the purchase of the land, and did so by way of a loan to the appellee, and took the certificate as a security for the repayment of the sum so provided by him, such facts would be entirely inconsistent with his theory that he and his father, with their own money, purchased the land for the appellant, and would constitute a recognition of such an interest in her as entitled her to redeem from him, and such an interest as would constitute a consideration for his subsequent promise on which she sued.

If the instructions contained no misstatement of law to his injury, he can not be heard to complain of them. If he desired that other propositions should be stated to the jury, he should have made proper request therefor.

In a bill of exceptions it is stated that the defendant requested the court to give certain instructions, which are set out, and it is stated that the court refused to give them, and that the defendant excepted. It does not appear that the instructions so asked were signed by the defendant or his attorney, and it is insisted on behalf of the appellee that there could be no error, therefore, in refusing to give them. This position of the appellee is well taken. In *Choen* v. *Porter*, 66 Ind. 194, it was said: "If the instruction" (asked by the defendant) "had been refused, and the defendant were complaining of the refusal, the plaintiff might well object that it was not signed by the defendant or his attorney, whether it was contained in a bill of exceptions or otherwise, as the failure to sign might be good ground for a refusal to give it."

After each of these instructions are the words "Refused and excepted to at the time by the defendant," or words of like meaning, signed by the attorney for the defendant as such, and dated and signed by the judge.

This is not the signing of the instructions contemplated by the fourth clause of section 533, R. S. 1881, but must be regarded as a signing of the exception.

The cause appears to have been fairly tried and determined, and the judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs, with ten per cent. damages.

Filed Jan. 11, 1884. Petition for a rehearing overruled March 8, 1884.

No. 11,153.

HOFNER v. THE STATE.

INTOXICATING LIQUOR.—*Sale by Agent.—Instruction.*—Where, in a prosecution for an unlawful sale of intoxicating liquor, the evidence tends to show that the sale was made by the bartender of the defendant in his presence, it is not error to instruct the jury, that if an agent of the defendant, in his presence and with his knowledge and consent, made such a sale, the defendant would be liable.

From the Hancock Circuit Court.

C. G. Offutt and *R. A. Black*, for appellant.

F. T. Hord, Attorney General, *L. P. Newby*, Prosecuting Attorney, and *W. B. Hord*, for the State.

HAMMOND, J.—The appellant was indicted, tried by a jury and convicted for selling intoxicating liquor to a minor. His motion for a new trial, made at the proper time, was overruled and an exception taken to the ruling.

The court, among other charges, instructed the jury that if an agent of the appellant, in his presence and with his knowledge and consent, sold intoxicating liquor to the prosecuting witness, the appellant would be liable the same as if he made the sale himself.

It is objected to the instruction that there was no evidence making it applicable to the case. But in this we can not agree with appellant's counsel. The evidence was clear that the prosecuting witness was a minor, and that he purchased intoxicating liquor at the appellant's saloon. And while the evidence tends quite strongly to prove that the purchase was made of the appellant himself, there was some evidence tending to show that it was made of a bartender in the appellant's presence. There was no error in giving the instruction.

The evidence was sufficient in favor of the verdict to prevent a reversal of the judgment.

Judgment affirmed, with costs.

Filed March 4, 1884.

No. 10,353.

McCormick Harvesting Machine Company v. Embree.

Sale.—*Contract.—Breach of Warranty.—Notice.*—In an action to recover the agreed price of a self-binding reaper, the defence was a breach of a written warranty wherein it was stipulated that "if, upon one day's trial, the machine should not work well," the purchaser should give immediate notice to the seller, or its agent, and allow time to put it in order, and, if it could not thus be made to work well, the purchaser should return it at once to the agent. It was alleged, in the answer, that, upon the first day's trial, the machine broke and became useless, in the presence of the seller's agent, who then promised and agreed to return on a certain day, and repair the machine and put it in good condition, which he did not do, and that the purchaser then offered to return the machine, but the agent refused to receive it.

Held, that the answer stated a good defence to the action, and that the seller could not recover the price of the machine.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

A. Steele, R. T. St. John, R. G. Steele,— Compton and *E. S. Lenfesty*, for appellee.

Howk, C. J.—In this case the appellant, a corporation under the laws of the State of Illinois, sued the appellee in a complaint of two paragraphs. In the first paragraph the appellant alleged that on June 15th, 1881, it sold and delivered to the appellee a self-binding reaping machine, at his instance and request, for the sum of $300, which sum was due and unpaid. Wherefore, etc. The second paragraph of the complaint counted upon a written contract between the parties, whereby the appellant agreed to sell and deliver, and the appellee agreed to buy and pay for, a self-binding reaping machine, at a certain price and upon certain terms and conditions expressed in such contract. The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below; and, over appellant's motion for a new trial, judgment was rendered against it for appellee's costs.

In this court the appellant has assigned as errors the following decisions of the circuit court:

1. In overruling its demurrer to the second paragraph of appellee's answer;

2. In overruling its demurrer to the third paragraph of appellee's answer; and,

3. In overruling its motion for a new trial.

The first paragraph of appellee's answer was a general denial of each and every allegation of appellant's complaint.

In the second paragraph of his answer the appellee alleged that he agreed to purchase of the appellant a self-binding reaper, which the appellant warranted to be well made, of good material and durable with proper care; that he, with appellant's agent, took the machine or reaper to appellee's farm on Saturday, when the appellant's agent set the reaper up, and he and appellee, with necessary assistance, started the same in the harvest, and that in less than one hour, and while the appellant's agent was present, the reaper broke and became and was useless; that the appellant, by its agent, then and there promised and agreed to return on the following Tuesday and repair the reaper and put the same in good condition, which he did not do; that the appellee then notified appellant's agent to do so, and informed him that unless he repaired the reaper at once appellee would be compelled to purchase another; that his harvest was then suffering for want of cutting, and that he had entered into contracts with others to reap for them; that unless appellee could have the reaper in good condition, he could not perform his said contracts; that the appellant wholly failed and neglected to repair the reaper or give it any attention, or to give appellee any satisfaction therein, and that by reason of the then suffering condition of his harvest, and of his said contracts, he was compelled to and did purchase another reaper; that the appellant had ample and reasonable time to have repaired said reaper; that appellee notified the appellant that he could not take the reaper, and he did not; that he then offered to re-

turn the reaper to appellant's agent at Marion; who informed him that he need not do so, as he would not receive it; that appellant's warranty of the reaper was, in substance, as follows:

"The McCormick H. & Wire Binder ordered this 17th day of May, 1881, by Silas Embree of Marion, is warranted to be well made, of good material and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to said McCormick Harvesting Machine Co., or their agent, and allow time to send a person to put it in order. If it can not thus be made to work well, the purchaser shall return it at once to the agent of whom he received it, and all cash and notes received in settlement will be refunded.

"(Signed) McCormick Harvesting Machine Co."

Countersigned by "A. Fisherbuck, Ag't."

And the appellee prayed judgment for costs and other relief.

In the third paragraph of answer, substantially the same facts are stated as in the second paragraph, but more fully and in different order and phraseology.

In discussing the sufficiency of the second and third paragraphs of answer to constitute defences to the action, the appellant's counsel claims that each of the paragraphs was bad on the demurrer thereto, for the following reasons: 1. Because it is not averred therein that appellee gave immediate notice of the failure of the machine to work well, to the appellant or its agent; and, 2. Because it is not shown in either paragraph that appellee allowed the appellant "time to send a person to put the machine in order." These objections do not seem to us to be well taken, as to either paragraphs of answer. As to the first objection, it is shown by the averments of the paragraphs of answer, that appellant's agent was there present, when the machine broke and became useless, and thus had actual and ocular notice of the failure of the machine to work well; and as to the second objection, it is also shown that the appellee allowed the agent the time

fixed by himself to put the machine in order. Again, appellant's counsel claims that the paragraphs of answer were bad, for the want of averments therein that appellee had returned the machine to the agent of whom he received it. The averments on this point were that appellee offered to return the reaper to appellant's agent, who informed him that he need not do so, as he would not receive it. These averments show a sufficient excuse for the failure to return the machine to the agent. We are of opinion that the second and third paragraphs of answer each state sufficient facts to show the appellant's breach of its warranty of the machine, sold and delivered to the appellee, and that the demurrers thereto were correctly overruled. *McCormick, etc., Co.* v. *Hays*, 89 Ind. 582.

There is legal evidence in the record tending to sustain the verdict of the jury on every material point. In such a case, as we have often decided, we will not disturb the verdict of a jury, nor reverse the judgment of the trial court, upon what might seem to us to be the weight of the evidence. *Fort Wayne, etc., R. R. Co.* v. *Husselman*, 65 Ind. 73; *Hayden* v. *Cretcher*, 75 Ind. 108; *Cornelius* v. *Coughlin*, 86 Ind. 461.

Other causes for a new trial were assigned by appellant, but as these are not discussed in the brief of its counsel, we regard them as waived.

We find no error in the record.

The judgment is affirmed, with costs.

Filed March 8, 1884.

No. 10,957.

PEPPER ET AL. *v.* ZAHNSINGER ET AL.

94 88
129 [illegible]
94 88
137 133
94 88
147 254
94 88
150 110
150 111
94 88
154 423
156 618
156 619

DECEDENTS' ESTATES.—*Sale of Land to Pay Debts.—Jurisdiction.—Judgment.—Irregularity.—Collateral Attack.*—When, upon petition by an administrator for an order to sell his intestate's land to pay debts, the court has jurisdiction over both the subject-matter and the parties interested, a judgment thereon, ordering such sale, can not be collaterally attacked for mere irregularities.

SAME.—*Order to Sell Widow's Third.*—Such a judgment, so far as it orders the sale of the widow's third, is void.

SAME.—*Widow may Estop Herself.*—An order of sale of the interests of both the widow and the heirs having been granted, she subsequently requested the administrator, in writing, to sell her interest with the residue; he advertised the sale to be made by him both as agent and administrator, and made sale without objection by her, but made deed as administrator alone; he paid the widow almost the full third of the proceeds; he delivered possession to the purchaser who continued in possession for eight years.

Held, that the widow had estopped herself from claiming title to such land.

From the Vanderburgh Circuit Court.

R. D. Richardson and *J. T. Walker*, for appellants.

C. L. Wedding and *J. G. Winfrey*, for appellees.

ELLIOTT, J.—John F. Pepper died intestate, the owner of the real estate here in controversy, leaving surviving him, as heirs, his widow, Mary, and his children, John and George, who now claim the property, and brought this action to recover it. The appellees bought the land at a sale made by Christian Decker, administrator of the estate of John F. Pepper, pursuant to the judgment of the court of common pleas of Vanderburgh county, rendered on the petition of the administrator praying that the land be sold for the payment of debts due from the decedent's estate.

Many irregularities are pointed out in the proceedings wherein the judgment directing the sale of the land was rendered, and these, it is argued, vitiate the sale and make the deed ineffective. This position is not tenable. A judgment, rendered upon the petition of an administrator, directing the sale of land for the payment of debts, can not be collaterally impeached for mere errors or irregularities. If there is jurisdiction of the subject-matter and of the person, the judgment will repel a collateral assault although many errors may have intervened. It is clear, therefore, that as the court of common pleas had jurisdiction of the person of the children of the decedent and of the subject-matter of the controversy, its judgment concludes the children of John F. Pepper, and di-

vests them of the interest possessed at the time the judgment was rendered.

A different question is presented by the contention of the appellant Mary Seeling, formerly the widow of John F. Pepper. It is established by our decisions that the interest of a widow in the land of her deceased husband can not be ordered sold to pay the debts of the estate. The decisions go very far, for they hold that the court has no jurisdiction to render a judgment directing the sale of the widow's interest. *Kent* v. *Taggart*, 68 Ind. 163; *Elliott* v. *Frakes*, 71 Ind. 412; *Armstrong* v. *Cavitt*, 78 Ind. 476. An order made by a court in a cause where it has no jurisdiction is void, and no title can be built upon it. So far, then, as the title of appellees to the interest of the widow is concerned, it must rest upon some other basis than the administrator's sale, or it will be invalid.

The title of appellees is asserted to rest on an estoppel. It is no doubt true that title may be created by an estoppel, and the debatable question here is, whether the appellant Mary Seeling is estopped from questioning the title of the appellees.

The evidence shows that Mrs. Seeling desired the administrator to sell her interest in the land, and executed an instrument requesting him to do so; that he did offer for sale and sell the entire estate in the land, that of the widow as well as that of the children; that he advertised to sell the land as guardian, administrator and agent; that the widow received all, or nearly all, the money realized from the sale; that the purchasers entered into possession under the deed executed by the administrator, and had been in possession for more than eight years; and that no part of the money paid by the purchaser, nor any part of that received by Mrs. Seeling, has been repaid, nor has there been any offer to repay it. In our opinion this evidence warranted a verdict in favor of the appellees, for it established facts constituting an estoppel. There was, on the part of Mrs. Seeling, more than a mere passive standing by; there was an active participation in the sale. One of the witnesses testified: "She (the widow) knew all

about the sale; she never objected, but wanted all sold; it was sold; she wanted the proceeds to pay off a mortgage." The administrator testified: "She knew I was to sell all her right, title and interest."

Judgment affirmed.

Filed March 4, 1884.

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No. 10,884.

LAKE ERIE AND WESTERN RAILWAY COMPANY v. PARKER.

PRACTICE.—*Objections to Evidence.—Supreme Court.*—Objections to evidence not stated to the court below will not be considered by the Supreme Court.

SAME.—An objection below to evidence, that it is "irrelevant, incompetent and immaterial," will not warrant the Supreme Court in considering whether or not it expressed merely the inadmissible opinion of the witness.

SAME.—*Motion for New Trial.*—A ruling admitting evidence, unless stated as a cause for a new trial, can not be questioned in the Supreme Court.

INSTRUCTIONS.—*Credibility of Witnesses.*—An instruction, that when evidence can not be reconciled the jury have the right to believe the witnesses deemed most worthy of credit, and disbelieve those least worthy of credit, and that in weighing evidence it is proper to consider the circumstances surrounding the witnesses, and from a preponderance of the evidence determine the rights of the parties, is not objectionable on behalf of the defendant, if the jury is also told that the plaintiff has the burden of the issue, and can not recover unless by a preponderance of the evidence he proves the averments of his complaint.

From the Madison Circuit Court.

R. S. Gregory and *A. C. Silverburg*, for appellant.

G. H. Koons, for appellee.

BICKNELL, C. C.—This was an action by the appellee to recover the value of a mare killed upon the appellant's road by its train of cars, where the road was not securely fenced. The appellee had a verdict for $125; judgment was rendered thereon. The only error assigned by the appellant is overruling its motion for a new trial.

There were several reasons for a new trial; the appellant, in

its brief, discusses only the sufficiency of the evidence, the admission of certain testimony of the witnesses McClellan Morgan and John Parker, and an alleged error of the court in giving to the jury, of its own motion, instruction No. 3. The appellant claims that the evidence fails to show that the mare was struck by the train. It is not necessary that this should be proved by a witness who saw it; it is sufficient if facts are shown from which the jury may reasonably infer that the animal was struck by the train. We think that in this respect there was evidence tending to support the verdict, which, therefore, can not be disturbed upon the evidence.

McClellan Morgan testified: "I was going down to the store and I waited near the crossing until the train got past; before the train reached the crossing the mare went on the railroad, and went ahead of the engine, running east, and after the engine passed me I could not see anything more of the mare until she jumped from the track on the north side of the road; after the reflection of the headlight was off of her I saw no more of her until the next morning at about 8 o'clock; she was then lying about 150 or 200 yards from the railroad; she appeared to be nearly dead; she had her right hind leg broken just above the hock-joint; the bone was broken plumb off, and was hanging by a small piece of the skin; I was on the north side of the road and saw her go off by the reflection of the headlight; the engine was about twenty feet, as near as I can tell, from the mare when she first got on the track, and it was about fifty yards, I believe, to where she went off; at the time the mare went off the track it appeared to me that the engine was right to the mare, but I think she was not struck; I did not think so until the next morning; I saw her run off on the north side."

Question by appellee: "Tell the jury what your best judgment is, from what you saw there, as to whether the engine struck the mare or not?" To this question the appellant objected, because it was irrelevant and immaterial, and sought the opinion of the witness instead of the facts. The objec-

tion was overruled, and the witness answered: "My opinion is that the engine struck the mare, from what I saw." The appellant, in its brief, treats this answer as having gone to the jury, but the record shows that it was stricken out by the court on the motion of the appellant immediately.

The witness continued: "I was about fifteen feet from the mare when she passed on to the railroad; she was going tolerably fast; when she passed off the track there was no indication of her being crippled; I don't think she limped, if she did I did not notice it."

Question by appellee: "You may tell the jury whether there was any other way there, anything else that could have produced that injury; if you know of anything there except the railroad?" The appellant objected to this question, for the reason that "it was irrelevant, incompetent and immaterial." This objection was overruled, and the witness answered: "There was nothing that I know of." The appellant's counsel, in their brief, discuss this matter as if the objection to the question in the court below had been that the question sought the opinion of the witness, but no such objection was there made. Objections, as to the admissibility of evidence, which were not made below, can not be made here. *Bruker* v. *Kelsey*, 72 Ind. 51; *McIlvain* v. *State, ex rel.*, 80 Ind. 69. The objection that the evidence was "incompetent" was too indefinite to present any question. *Cox* v. *Stout*, 89 Ind. 422; *Stanley* v. *Sutherland*, 54 Ind. 339. The question was not irrelevant or immaterial; it was substantially this: "If you know of anything except the railroad which might have produced the injury, tell the jury what it was." The answer was: "Nothing that I know of." The same question, substantially, was put by the appellant's counsel, afterwards, in the following form: "What, if anything intervened, in the shape of obstructions, between the mare and the railroad the next morning?" The court did not err in overruling the objection made below to this part of the testimony of McClellan Morgan.

The witness John Parker testified that he had seen the mare lying in the street the next morning at 6 o'clock, and that where the mare left the railroad there was a descent to the adjacent ground of about two feet and then a ditch twelve or fifteen inches deep and five feet wide, and he described the appearance of the broken leg.

Question by appellee: "You may tell the jury whether there was anything else there, anywhere between the fifty or about fifty yards along that railroad on the north side, between that and the place where you found this mare, that could have caused that injury?" To this the appellant objected for the reason that "it is irrelevant, incompetent and immaterial." The objection was overruled and the witness answered, "I saw nothing there that would be likely to cripple a horse." This matter also is discussed by the appellant, as if the objection had been that the question demanded the opinion of the witness; but no such objection was made below to this question. The only available, specific grounds of objection stated below were that this testimony was irrelevant and immaterial; therefore, under the authorities cited above, there is no question here as to the admissibility of opinion, and there was no error in overruling the objections, as they were made below, to this part of Parker's testimony.

Question by appellee: "State to the jury, whether from the point where this mare was knocked off the railroad, fifty yards east of the highway crossing, there where you found her, whether there was any obstruction to prevent an animal from going on three legs around to that point?" The appellant objected to this question because "it is irrelevant, incompetent and immaterial, and because it assumes a fact which has not been proven, and because it elicits the opinion of the witness instead of facts."

The court overruled the objection and permitted the question to be answered.

This action of the court is not stated among the reasons for a new trial. The only error assigned here being the over-

ruling of the motion for a new trial, we can consider only what the court below was required by the motion for a new trial to consider. An exception to a ruling upon evidence, not followed by a statement of such ruling as a cause for a new trial, presents no question here. *McGee* v. *Robbins*, 58 Ind. 463; *Cobb* v. *Krutz*, 40 Ind. 323; *McKinney* v. *Shaw, etc., Co.*, 51 Ind. 219. There was no available error in the admission of testimony.

Instruction No. 3, given by the court of its own motion, is as follows:

"You are the judges of the evidence and credibility of witnesses. It is your duty to reconcile all the statements of witnesses, so as to believe all the testimony if you can. If you can not on account of contradictions, then you have the right to believe the witnesses you deem most worthy of credit, and disbelieve those least worthy of credit. And in weighing the testimony it is proper for you to take into consideration all the surrounding circumstances of the witnesses, their interest in the result of the action, and their opportunity of proving the truth of the matter about which they testify, and from a preponderance of all the evidence, thus considered, you will determine the rights of the parties to this action, and make your verdict accordingly."

To this instruction the appellant makes three objections:

1. That the instruction tells the jury that they are to believe the witnesses most worthy of credit *generally*, and to disbelieve those least worthy of credit *generally*, "irrespective of the reasonableness of their testimony, their opportunity to know the facts," etc.

2. That the instruction tells the jury that in weighing the testimony they must take into consideration all the surrounding circumstances of the witnesses, whereas they ought to consider only the circumstances proven in the case.

3. That the court tells the jury that they must determine the rights of the parties from a preponderance of the evi-

dence, whereas it ought to have told them that if there was no preponderance there should be a finding for the defendant.

These objections are too refined to be sustained. The phrase "worthy of credit," as used in the instruction, means "worthy of credit" with reference to this case; the phrase "surrounding circumstances of the witnesses" means the circumstances surrounding the witnesses with reference to this particular case, such as those named in the instruction.

As to the third objection, it is generally true that the rights of parties are determined by a preponderance of evidence, and in this case the court, in its instruction No. 1, of its own motion, and in its instruction No. 1, given at request of defendant, expressly told the jury that the burden of proof was on the plaintiff, and that he could not recover without proving, by a preponderance of evidence, the material allegations of his complaint. We think there was nothing in instruction No. 3 by which the jury could have been misled.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed March 8, 1884.

No. 11,151.

POMEROY v. THE STATE.

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CRIMINAL LAW.—*Rape.—Force without Consent.*—Under section 1917, R. S. 1881, whoever unlawfully has carnal knowledge of a woman forcibly, against her will, is guilty of rape, and where, in such case, there is a carnal connection and no consent in fact, there is in the wrongful act itself all the *force* which the law demands as an element of the crime.

SAME.—*Conviction.— Sufficiency of Evidence.*—Where the evidence tends to prove that the prosecutrix "had been afflicted with epileptic fits since she was a year old, which came oftener and harder the older she got," that the defendant, as a physician, under the employment of her parents, made an examination of her person in the presence of her mother, and informed them that she had a terrible womb disease and was losing her mind, and that, as her physician, he afterwards obtained possession

and control of her person for the purpose of making a further examination of the alleged disease of the womb, and not for the purpose of sexual intercourse, and that by this means he unlawfully had carnal knowledge of the prosecutrix without her consent in fact, through fraud or otherwise, to the sexual connection, the judgment of conviction will not be reversed by the Supreme Court, on the ground of the insufficiency of the evidence to sustain the verdict, or because it is contrary to law.

From the Knox Circuit Court.

J. S. Pritchett and *H. Burns*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

HOWK, C. J.—The appellant, Mark Pomeroy, was indicted in the Gibson Circuit Court, at its May term, 1882. The indictment charged "that Mark Pomeroy, on the 8th day of October, A. D. 1881, at and in the county of Gibson and State of Indiana, did then and there unlawfully, feloniously and violently make an assault in and upon one Rebecca R. Reavis, a woman then and there being, and did then and there unlawfully, feloniously, violently, forcibly and against her will, ravish and carnally know her, the said Rebecca R. Reavis, contrary to the form of the statute," etc.

On the appellant's application, the venue of the cause was changed to the court below; and, upon his plea of not guilty, the issues joined were there tried by a jury, and a verdict was returned finding him guilty as charged, and assessing his punishment at imprisonment in the State's prison for the term of ten years. His motion for a new trial having been overruled, and his exception saved to such ruling, the court rendered judgment against him, in accordance with the verdict.

In this court, the only error assigned by the appellant is the overruling of his motion for a new trial. In this motion, the following causes were assigned by appellant for such new trial:

"*First.* The verdict of the jury is contrary to law;

"*Second.* The verdict of the jury is contrary to the evidence;

"*Third.* The verdict of the jury is contrary to the law and the evidence;

"*Fourth.* Error of law occurring at the trial of the cause, in this, to wit: The court permitted and allowed Rebecca R. Reavis to be examined as a witness on behalf of the State, the said Rebecca R. Reavis being incompetent to testify, for want of mental capacity and imbecility, as a witness; and to the allowing of her being a witness and testifying, the defendant objected, but the court overruled the objection and permitted her to testify, and the defendant at the time excepted."

The record of this cause discloses the following facts: In October, 1881, James Reavis and his wife, Margaret, were living on a farm in the eastern part of Gibson county, in this State. Besides themselves, their family then consisted of their three daughters and two boys they were raising. Their daughter, Rebecca R. Reavis, was then twenty-two years of age, large and stout, "but had been afflicted with epileptic fits since she was a year old, which came oftener and harder the older she got." The natural tendency and effect of these oft-repeated fits of epilepsy were to produce what the appellant himself calls, in his motion for a new trial, her "want of mental capacity and imbecility."

On the 8th day of October, 1881, in the afternoon, the appellant, Mark Pomeroy, in company with one John Patterson, went to the farm-house of James and Margaret Reavis. The appellant was an itinerant doctor, "travelling from place to place," and was an utter stranger to the Reavis family. John Patterson was acquainted with James Reavis, having served in the army with him for a considerable time. Appellant engaged Patterson to drive his team for him over the country; and, on the day named, Patterson introduced the appellant to James Reavis. In a private interview then had with James and Margaret Reavis, the appellant said to them: "I am a physician and have heard about the affliction of your daughter. I have bought property at Oakland City, and am going to build a large hospital on it to treat cases like hers, and have already secured one young lady to treat, and have called to see about treating your daughter." Appellant was

then informed by Rebecca's parents that she had been under the treatment of a good many doctors, none of whom seemed to do her any good, and that their son, who was then attending a medical college at Cincinnati, had stated her case to the professors, and they said she could not be cured.

In response to this, appellant said: "Yes; but the physician is now come who will revive your drooping spirits, and cure your daughter; these doctors who treated her, and the college professors, didn't understand her case or know how to treat her, for want of experience; my father was a physician and I was in hospitals, and know all about such cases; I have with me four or five diplomas from medical colleges. I am not practicing my profession for the sake of making money, but only for the sake of suffering humanity; as I am already so rich that I could not spend my fortune in a lifetime unless I recklessly drank and gambled it away."

Appellant then asked to see Rebecca, and said, in the presence of her mother, he would have to examine her, and put his hand up under her clothes for that purpose. She objected to such an examination; but her mother told her that appellant said he could cure her, and that she must let him examine her. After the examination appellant declared that Rebecca had "a terrible womb disease, and was losing her mind." Her parents then employed appellant to cure her; and he and his driver stayed all night at Reavis' house. The next morning appellant took Rebecca into a private room, and, while pretending to make a further examination of her person, succeeded in having sexual intercourse with her. She made no outcry at the time, but after appellant had gone her mother found her crying, and she then complained to her mother that he, appellant, "had committed an outrage upon her." Shortly afterwards the appellant was arrested upon the charge for which he was indicted, tried and convicted in this case.

The bill of exceptions appearing in the record fails to show that the appellant objected or excepted, on any ground, to the competency of Rebecca R. Reavis, a witness for the State.

Therefore the only question presented for our decision is this, is the verdict of the jury sustained by sufficient legal evidence?

The offence of which the appellant was convicted in this case is defined and its punishment prescribed in section 1917, R. S. 1881. This section reads as follows:

"Whoever unlawfully has carnal knowledge of a woman forcibly against her will, * * * is guilty of rape, and, upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one years nor less than five years."

On behalf of the appellant, it is earnestly insisted that the evidence wholly fails to show that he had carnal knowledge of Rebecca R. Reavis "forcibly against her will." Whether the carnal knowledge was had forcibly against her will or not, would seem to be a question of fact for the jury rather than of law. We are of opinion, however, that the jury were justified by the evidence in finding, as they must have done, under the instructions of the court, that the carnal knowledge was had forcibly and against the will of the prosecuting witness. The evidence wholly fails to show that Rebecca ever consented to, or even had knowledge of, the act of sexual intercourse, until after it was fully accomplished. In such a case the force required by the statute is in the wrongful act. Thus, in 2 Bishop Criminal Law (7th ed.), section 1120, it is said: "Whenever there is a carnal connection and no consent in fact, fraudulently obtained or otherwise, there is evidently, in the wrongful act itself, all the *force* which the law demands as an element of the crime."

The evidence tended to show that the appellant, as a physician, informed Rebecca and her mother that the former was suffering from a terrible womb disease, and was losing her mind. If the jury believed, as they might well have done under the evidence, that the appellant, as a physician, obtained possession and control of Rebecca's person, under her mother's command, for the purpose of making a further examination of her alleged disease of the womb, and not for the purpose of sexual intercourse, and that she never, in fact,

gave her consent, through fraud or otherwise, to the sexual connection, then, it seems to us, that the case in hand falls fairly within the doctrine declared in *Queen* v. *Flattery*, 2 L. R., Q. B. Div. 410, decided in 1877, and that the appellant was lawfully convicted of the crime of rape. In the case cited, as in this, the defendant professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen years, like the prosecutrix in this case, was "subject to fits," and she and her mother consulted the defendant in regard to her case, and informed him of her condition. The defendant, as in this case, made an examination of the person of the prosecutrix, and advised that a surgical operation be performed, and under the pretence of performing it had carnal connection with her. It was held by the court that the prisoner was guilty of rape. KELLY, C. B., said: "It is plain that the girl only submitted to the plaintiff's touching her person in consequence of the fraud and false pretences of the prisoner, and that the only thing she consented to was the performance of the surgical operation. Up to the time when she and the prisoner went into the room alone, it is clearly found on the case that the only thing contemplated either by the girl or her mother was the operation which had been advised; sexual connection was never thought of by either of them. And after she was in the room alone with the prisoner, what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation. In other words, she submitted to a surgical operation and nothing else. It is said, however, that, having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument. The case is therefore not within the authority of those cases which have decided,

decisions which I regret, that where a man by fraud induces a woman to submit to sexual connection, it is not rape."

In the same case MELLOR, J., also said: "I am of the same opinion. * * * It is said that submission is equivalent to consent, and that here there was submission. But submission to what? Not to carnal connection. The case is exactly within the words of WILDE, C. J., in *Reg.* v. *Case*, 1 Den. Cr. C., at p. 582: 'She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will.'"

In *People* v. *Crosswell*, 13 Mich. 427, after citing some decisions, both in England and in this country, to the effect that if the woman's consent is obtained by fraud the crime of rape is not committed, COOLEY, J., said: "But there are some cases in this country to the contrary, and they seem to us to stand upon much the better reasons, and to be more in accordance with the general rules of criminal law: *People* v. *Metcalf*, 1 Whart. C. C. 378, and *note* 381; *State* v. *Shepard*, 7 Conn. 54. And in England, where a medical practitioner had knowledge of the person of a weak-minded patient, on pretence of medical treatment, the offence was held to be rape: *Regina* v. *Stanton*, 1 C. & K. 415; *Same Case*, 1 Den. C. C.—The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman when her consent is obtained by fraud, than when it is extorted by threats or force."

In the case at bar, we are of opinion that the verdict of the jury was fully sustained by the evidence appearing in the record, and that it was not contrary to, but in strict accordance with, the law applicable to such evidence. The court committed no error, therefore, in overruling appellant's motion for a new trial.

The judgment is affirmed, with costs.

Filed Dec. 20, 1883. Petition for a rehearing overruled March 6, 1884.

No. 11,168.

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146 594

THE STATE, EX REL. STALLINGS, *v.* READ ET AL.

EXECUTION. —*Exemption.* —*Pleading.*—*Exhibits.* —An execution defendant may, on filing the proper schedule, select the property which shall be exempt, at any time before or after levy, prior to sale; to this end a substantial and not a literal compliance with the statute is required, and in pleading that he took the steps required by the statute, it is not necessary to exhibit the schedule.

SAME.—*Construction of Statute.*—The statute exempting property from execution, as well as proceedings under it, must be liberally construed, not only in behalf of the defendant, but also of the officer holding the execution, when it is sought to hold him liable for failure to make the money.

From the Posey Circuit Court.

E. D. Owen, for appellant.

W. P. Edson, for appellees.

ELLIOTT, J.—The relator's complaint alleges that the appellee William Read, as principal, and the other appellees, as sureties, executed the bond sued on; that the bond was executed to secure the faithful discharge of the duties of the office of justice of the peace by Read; that Read, while in the discharge of the duties of his office, rendered judgment in favor of the relator for $179.10 against one John Schull; that he appointed Jonathan Alsop a special constable and issued to him an execution on the relator's judgment; that during the life of the execution Schull had a large quantity of personal property subject to levy and sale on execution out of which the judgment could have been made, but the special constable, Alsop, refused to make a levy on the property.

To this complaint the appellants answered, that during the time the execution was in the hands of the special constable, the debtor, John Schull, had less than $300 worth of personal property and was a resident householder of the State of Indiana, and was entitled to claim the property as exempt from execution, and did elect to claim it as exempt, and, on the 22d day

of August, 1881, duly made out and delivered to the special constable an inventory of all his real property within or without the State, money on hand or deposit within or without the State, rights, credits and choses in action, and all personal property of every description whatever belonging to him, the said Schull, or in which he had any interest at the date of the issuing of the execution; that the schedule was duly sworn to by Schull; that the property was duly appraised by two disinterested householders of the neighborhood; that the schedule and appraisement, duly sworn to, were delivered to the special constable; that the appraisement of all the personal property of Schull was $166.05; that Schull elected to take the property as exempt from execution, and thereupon the special constable returned the writ with his doings thereon.

The justice of the peace was responsible for the official conduct of the special constable appointed by him, and if the special constable negligently failed to execute the writ delivered to him, the justice became liable on his bond for the loss sustained by the execution plaintiff. R. S. 1881, sec. 1440.

The answer states such facts as show that the special constable was not bound to levy the execution issued on the relator's judgment. The execution defendant had a right to select the property that he desired should be exempt from levy and sale. R. S. 1881, section 704.

It is not necessary to set forth the schedule in an answer, as it is not the foundation of the defence. *Hall* v. *Hough*, 24 Ind. 273. The defence consists of the right to the exemption and a compliance with the statutory requirements as to making, verifying and filing the schedule. An answer, which shows the person to be entitled to the exemption and to have filed such a schedule as the law requires with the proper officer, is good. This is done in the present instance by fully stating all the material facts, and this is the proper method. It would be bad pleading to set forth the evidence.

An execution defendant may assert his claim to exempt property at any time before sale. *Pate* v. *Swann*, 7 Blackf.

500. Counsel for appellant is in error in asserting that the right can only be asserted after levy, for, so far from this being true, it is true that where the claim is properly made and enforced the officer should not levy. *State, ex rel.*, v. *Melogue*, 9 Ind. 196.

The counsel for the appellant says that the first paragraph of the reply presents the question as to whether "the defendant, having more property in real and personal than the exemption allowed him, can retain the personal and designate to a constable the real estate to sell?" The statute to which we have referred answers this question against him, for it provides that the debtor "may elect or designate" either real or personal property, or he may designate both. R. S. 1881, sec. 704.

It is very doubtful whether the evidence can be said to be in the record, but as we have no brief from the appellee we have concluded to treat it as properly before us, and examine the questions argued by counsel. The first question arising on the evidence is thus stated by counsel: "Was the schedule filed by the execution defendant sufficient in law to entitle him to an exemption?" The first alleged defect is thus pointed out: "After the words 'property real,' the words 'within or without this State' are left out." The caption of the schedule is in these words: "Schedule of property belonging to John Schull, August 22d, 1881." This is followed by a specific description of his property, real and personal, and then follows the sworn statement, reading thus: "I, John Schull, do solemnly swear that the foregoing is a full and complete schedule of all my property, real and personal, goods, credits, money and effects, and choses in action, owned and belonging to me on the 22d day of August, 1881, and that I have not sold any property since that date to the present time other than that accounted for in the schedule above." The omission of the words "within or without the State" does not impair the force of the instrument, for it appears by its statements that it includes all of the debtor's property, wherever situated.

Another objection urged is that the schedule does not contain after the word "money," the words "or on deposit;" and still another objection is that the word "rights" is not used in the schedule. We think it contains equivalent words, and sufficiently shows that the whole of the property owned by the debtor is exhibited and accounted for, and this is all that the statute requires. Even in criminal prosecutions, where life and liberty are involved, it is sufficient in charging the offence to use words of equivalent meaning with those employed in the definition of the offence, and certainly equivalent words should be deemed sufficient, where the law is to be liberally construed, and the conduct of the debtor is not to be strictly measured by rigid rules. It is well settled in all cases of this kind that, as said in *Gregory* v. *Latchem*, 53 Ind. 449, proceedings in carrying out the statute securing exemption "should be liberally construed." *Haas* v. *Shaw*, 91 Ind. 384.

The remaining objection to the schedule is that it does not, in terms, state that the debtor had not disposed of any property since the date the writ issued. We think it does show that none had been disposed of, because it fully describes all property owned by the debtor on the day the writ issued, and shows that he still owned it at the time the schedule was executed. The entire instrument is to be considered, and taking it altogether, the ownership, description, and situation of the property is fully exhibited. *Gregory* v. *Latchem*, *supra*.

The only question presented by the agreed state of facts is as to the sufficiency of the schedule, for we find in it this statement: "That the property named in the annexed schedule filed in said cause was the property of said John Schull, execution defendant, and was of the value set upon it by the appraisers, and was subject to levy and sale under said execution unless the execution defendant, Schull, had a right to retain the same away from such levy and sale by reason of the annexed schedule." The appellant's counsel has, as appears from his argument, justly considered this statement of facts as presenting simply the question of the sufficiency

of the schedule, and that question we have considered and decided.

A constable is bound, at his peril, to accept a proper schedule when duly tendered by the debtor, and if he levies after the tender of a proper schedule he is a trespasser. *Stephens* v. *Lawson*, 7 Blackf. 275. The officer can not dispute the truth of the schedule, but must act upon it, and set apart the property claimed by the debtor, even though the latter owns property not exhibited in the schedule. *Douch* v. *Rahner*, 61 Ind. 64. A mandate will lie to compel the sheriff to set apart the property designated by the debtor. *Young* v. *Baxter*, 55 Ind. 188; *Pudney* v. *Burkhart*, 62 Ind. 179; *Mark* v. *State*, 15 Ind. 98. The right of the debtor to claim the property need not be exercised until after appraisement, and he may then designate the property he elects to claim. *Kelley* v. *McFadden*, 80 Ind. 536. It appears from the decisions to which we have referred that the debtor is favored in the matter of exemption, and that the officer is placed in a situation of difficulty and embarrassment; for, if he rejects a schedule which is in substantial compliance with the statute, he is liable to the debtor, or if he fails to set apart property claimed by the debtor, when the claim is substantially such as the law recognizes, he is answerable in damages. There is, it is plain, much more reason for adopting a liberal construction of a schedule accepted by an officer than for enforcing the rule of liberal construction in favor of the debtor. It is in the power of the debtor to exactly conform to the law, but it is hardly possible that a sheriff or a constable should always be able to judge whether there was or not a substantial compliance with the statute, and to hold these officers to a strict and rigid accountability would be most unjust. In our opinion the rule is, and should be, that where an officer is sued by an execution creditor for failure to seize property on execution, and it appears that the officer has accepted, in good faith, a schedule from the debtor, the schedule will receive a liberal construction. The cases we have cited

make the officer liable if he fails to act upon a schedule, liberally construed, and surely he may invoke the rule of liberal construction for his protection. He ought, indeed, to have applied to his acts a more favorable rule than that accorded the debtor. Judgment affirmed.

Filed March 7, 1884.

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94 108
140 151
94 108
166 370

No. 11,005.

MITCHELL ET AL. v. FISHER.

MORTGAGE.—*Release of.—Principal and Surety.*—When the principal in a note executes a mortgage to his surety to secure the payment of such note, and the surety afterwards becomes the owner of the land, releases the mortgage, executes another to his creditor, who is the payee's attorney, and who transfers such mortgage to another, the payee of such note may foreclose such mortgage against such surety and the holder of such second mortgage.

SAME.—*Estoppel.*—In such action an answer by the holder of such second mortgage, that the mortgagee was informed by the payee of the note, before he took such mortgage, that such payee did not have nor intend to claim any lien upon said land by virtue of the first mortgage, does not constitute an estoppel.

From the Monroe Circuit Court.

J. H. Louden, R. W. Miers and *L. Ferguson*, for appellants.

J. W. Buskirk and *H. C. Duncan*, for appellee.

BEST, C.—This action was brought by the appellee against the appellants to foreclose a mortgage.

The facts averred are substantially these: That James Golden, deceased, and Abraham Weaver, on the 22d day of January, 1879, made their note to the appellee for $770; that Golden was principal and Weaver surety, and on the next day Golden and his wife executed to Weaver a mortgage upon eighty acres of land to secure the payment of said note and to indemnify Weaver against its payment; that on the 5th day of November, 1880, said note was placed in the hands of Levi Ferguson, an attorney, for collection, and that he continued the appellee's attorney until the 25th day of

December, 1881; that during this time Henry A. Smock became a partner of said Ferguson in the practice of the law, and both were fully informed as to the execution of said mortgage; that said Weaver purchased two-thirds of said land from the administrator of said decedent, and the residue from the widow; that thereafter he released of record the said mortgage, and on the 21st day of November, 1881, he executed to said Ferguson & Smock a mortgage upon said land to secure a note of $176.61, they then held against him; that the appellant Mitchell claims the mortgage made to Ferguson & Smock as aforesaid. Prayer that the entry of satisfaction be set aside, the mortgage be foreclosed on behalf of the appellee as against all the defendants, etc.

The appellant Mitchell filed an answer of three paragraphs. The first was subsequently withdrawn, and the second was embraced within the third.

The third averred substantially that before the execution of the mortgage to Ferguson & Smock, they inquired of the appellee whether he had or intended to claim any interest in or lien upon said land by virtue of such mortgage so executed to said Golden, and he informed them that he did not have, nor did he intend to claim any interest in or lien upon said land, and that said Ferguson & Smock, relying upon said statement, accepted such mortgage as security for their claim, and afterwards sold and transferred said mortgage for value to the appellant, who purchased the same without notice of the appellee's claim, and after the mortgage sued upon had been released of record, by reason of which he avers that the appellee is estopped to assert such mortgage as against him.

A demurrer was sustained to the second and third paragraphs of the answer, and the appellant declining to further plead, final judgment was rendered foreclosing said mortgage as against all the appellants.

The ruling upon the demurrer presents the only question in the record.

The facts averred in these paragraphs did not, as we think,

constitute an estoppel. The statements were made to Ferguson & Smock, from whom the appellant purchased his claim. They were, at the time the statements were made, the appellee's attorneys, and knew the facts. The statement that he had no lien was not the statement of a fact, but the expression of an opinion as to his rights under the mortgage, and an opinion upon which his attorneys had no right to rely. Nor did they have any right to rely upon the statement that he did not intend to enforce the mortgage. They knew he had the right to change his mind at any moment, and it was their duty to advise him to do so in order to collect his claim. Indeed, they could not discharge their duty to him without maintaining the most unquestioned loyalty to his interest, and therefore they could neither acquire any claim prejudicial to his interest, nor assert an estoppel to his prejudice.

Again, the statement that the appellee would not enforce the mortgage was a mere naked assertion, not based upon any consideration, made without being informed that Ferguson & Smock either intended or expected to take the mortgage in question, could be withdrawn at pleasure, and therefore did not constitute an estoppel.

The fact that the mortgage made to Weaver had been released of record before the appellant purchased the mortgage of Ferguson & Smock added nothing to the answer. The former showed, upon its face, that it secured the appellee's claim, and its cancellation by Weaver without the payment of the appellee's debt did not extinguish the lien. This the appellant was bound to know, and when he purchased a subsequent mortgage, without ascertaining whether or not the former had, in fact, been paid, he took the risk and must bear the loss.

These paragraphs were insufficient, and the demurrer properly sustained. The judgment should therefore be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellants' costs.

Filed March 6, 1884.

No. 11,179.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. CLARK.

RAILROADS.—*Killing Stock.—Fencing.—Burden of Proof.*—In a suit against a railroad company for killing an animal, on account of the want of a sufficient fence, if the company relies upon the fact that its road could not be fenced at the place in question, it has the burden of proof as to that matter.

From the Floyd Circuit Court.

D. M. Alspaugh and *J. C. Lawler*, for appellant.

S. B. Voyles and *H. Morris*, for appellee.

ZOLLARS, J.—Appellee recovered a judgment against appellant for the value of a horse killed by one of its trains, in the town of Salem, in Washington county. The venue having been changed, the case was tried in Floyd county.

The complaint is in two paragraphs. The first charges a negligent killing, without fault on the part of the plaintiff. The second is based upon the statute, and charges a failure to fence. The case is presented for review upon the evidence alone.

Appellant's counsel urge, with ability, that the judgment can not be maintained upon the first paragraph of the complaint, because of contributory negligence on the part of appellee. It will not be necessary for us to decide that question, as we feel constrained to affirm the judgment upon the second paragraph. The company, being liable under this paragraph, is liable without reference to contributory negligence on the part of appellee. *Louisville, etc., R. W. Co.* v. *Whitesell*, 68 Ind. 297; *Grand Rapids, etc., R. R. Co.* v. *Jones*, 81 Ind. 523.

The horse approached the railroad upon Mulberry street. The railroad does not intersect the street at right angles. The street does not extend across the railroad. It seems to be admitted that the south line of the street intersects the railroad so as to form an obtuse angle.

It is contended that north of this intersection there is a triangular piece of land between the railroad and the eastern terminus of the street, that might have been fenced. We do not regard this of much consequence to either party. There is evidence which tends strongly to show that the horse went upon the railroad thirty feet north of where the north line of the street intersects the railroad, or would intersect it if extended to it; and from a strip of land on the west side of the railroad, between it and an enclosed field. There was neither fence nor cattle-pit to prevent animals from going upon this strip of land. No sufficient excuse is furnished for the absence of them. If, as contended in argument, the company was not required to maintain a fence on the east side of the track, opposite this strip of land, it was absolved from the obligation of fencing it. *Indiana, etc., R. W. Co.* v. *Leak*, 89 Ind. 596. The strip of land in question extends from Mulberry street to a culvert, about one hundred yards north. Opposite this, on the east side of the railroad, there was no fence. It appears that appellee, in reaching his farm, has been accustomed to pass along the east side of the railroad track to a gate near the culvert. Whether he passes over the company's right of way, or if so, by what authority, does not appear. For aught that appears, the company might have built and maintained a fence on the east side of its track. Such being the case, it was bound to do so, and hence was also bound to maintain a fence on the west, with proper cattle-pits, to prevent the ingress of animals to the strip of land. The burden was upon the company to show that it was not required to maintain these fences. This it has failed to do. *Fort Wayne, etc., R. R. Co.* v. *Mussetter*, 48 Ind. 286; *Jeffersonville, etc., R. R. Co.* v. *Brevoort*, 30 Ind. 324; *Indianapolis, etc., R. R. Co.* v. *Lindley*, 75 Ind. 426.

If it appeared that the east side was left open for the accommodation of appellee, possibly a different result might have been reached.

Upon the question of the value of the horse the evidence is conflicting; we can not say that the amount allowed by the court is too large.

The judgment is affirmed, with costs.

Filed March 11, 1884.

No. 10,829.

SHELTON v. SHELTON.

94 113
138 481

MARRIED WOMAN.—*Judicial Sale of Husband's Equitable Interest in Lands.*—Where lands of a husband, held by equitable title, are sold under judicial proceedings, the inchoate interest of the wife is vested, by the statute, section 2508, R. S. 1881, upon the execution of a sheriff's deed to the purchaser.

From the Howard Circuit Court.

J. W. Kern, B. F. Harness, W. R. Payne and *J. F. Vaile,* for appellant.

M. Bell, W. C. Purdum and *F. Cooper,* for appellee.

FRANKLIN, C.—This is an action of partition by appellee against appellant. The errors insisted upon are the overruling of the demurrer to the complaint and the sustaining of the demurrer to the second paragraph of the answer. The same question is presented by both, and is, has a wife any interest in lands sold and conveyed at a judicial sale, when held by the husband by an equitable title only?

The 2491st section, R. S. 1881, provides that a surviving wife is entitled to one-third of all lands in which her husband had an equitable interest at the time of his death.

And the 2508th section, R. S. 1881, provides that when the legal title becomes absolute in the purchaser, the inchoate interest of the wife shall become vested in her, and that she shall have the right to the immediate possession thereof.

But it is insisted by appellant that the wife can only have an

inchoate interest in lands, held by an equitable title, where such lands are so held at the time of the husband's death; that where such lands have been sold by the sheriff, in the lifetime of the husband, all his equitable interest was gone, and he could not so hold said land at the time of his death, and therefore his wife could not have any interest in such lands.

It has been repeatedly held that the sheriff's deed, although not executed until the year for redemption has expired, yet, when executed, it relates back to the date of the sale, and becomes absolute from that date. The wife's right to possession also vests in her when the legal title becomes absolute in the purchaser, and when vested it also relates back to the date of the sale. *Hollenback* v. *Blackmore*, 70 Ind. 234; *Summit* v. *Ellett*, 88 Ind. 227; *Elliott* v. *Cale*, 80 Ind. 285; *Riley* v. *Davis*, 83 Ind. 1. Hence the statutes give the wife the same interest and rights in the lands held by the husband by equitable title at the date of the sale as though he had died at that date. Therefore, the wife has an interest in such lands, and is entitled to the possession thereof, the same as if the husband had held said lands by legal title, and she had not united in any conveyance thereof.

In the case of *Ketchum* v. *Schicketanz*, 73 Ind. 137, the following language is used: "When, therefore, the equitable interest of a husband in a tract of land is sold and conveyed away, under a judicial proceeding, his wife becomes immediately and absolutely entitled to one-third of such land as against the purchaser, provided the value of the land does not exceed ten thousand dollars." And this is substantially sustained by the case of *Keck* v. *Noble*, 86 Ind. 1.

There was no error in overruling the demurrer to the complaint, nor in sustaining the demurrer to the second paragraph of the answer.

The evidence is not in the record, and no point is made in appellant's brief upon the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed March 12, 1884.

No. 10,856.

KYLE v. THE BOARD OF COMMISSIONERS OF KOSCIUSKO COUNTY.

94 115
139 6
94 115
139 634
94 115
148 8
94 115
165 24
165 131

HIGHWAY.—*Vacation of.—Location of Bridge.—County Commissioners.—Injunction.—Pleading.*—Complaint to enjoin the erection of a bridge upon plaintiff's land. Answer that the *locus in quo* was a public highway; that a proper order had been made vacating the highway upon certain conditions to be performed by the petitioners therefor, which had not been performed. Reply showing by proper averments a lawful petition to vacate that part of the way and establish it elsewhere, notice thereof, and an order by the board granting the prayer upon report of viewers, and that the new way was opened by the proper authority, and made as good as the old.

Held, that the answer was good, also the reply.

SAME.—In a proper case wrongful entry on land to make a public way or bridge may be prevented by injunction.

From the Kosciusko Circuit Court.

C. Clemans, for appellant.

L. H. Haymond and *L. W. Royse*, for appellee.

ELLIOTT, J.—The complaint alleges that the appellant is the owner in fee of lands upon which the appellees have wrongfully entered and upon which they are about to construct the abutments of a public bridge. The answer avers that the land upon which appellees entered has been for more than twenty years a public highway of the county; and that for the same length of time a bridge had spanned a stream at the point where they were engaged in constructing the bridge described in the complaint.

The answer is good. A road used as a public highway for

twenty years vests a right in the public of which the owner of the fee can not divest them. The commissioners have authority to erect bridges over streams whenever the public safety and convenience require them.

Whether bridges shall or shall not be constructed is a matter largely within the discretion of the commissioners, and it is a familiar rule that courts will not interfere with the exercise of discretionary powers vested in an inferior tribunal.

Where a highway touches a stream over which it becomes necessary to construct a bridge, in order to enable the public to use it, the public authorities may rightfully place the abutments upon the way. Where a right to a public way is acquired by express or implied dedication, or by prescription, and the way leads to a stream which requires a bridge, the right to erect one is impliedly vested in the public. This results from the familiar rule that the grant of a principal thing carries with it all incidents, and the right to make a way continuous, so as to afford the public a safe and convenient way for travel, is an incident to all highways.

The answer does not show a vacation of the highway. It is true that it sets forth an order vacating it upon the performance of certain acts by the persons petitioning for the vacation, but it expressly avers that these acts have not been performed, and that there has been no vacation. It is a very ancient rule of the law that vacations of highways are not favored, and that the presumption will always be in favor of their continuance. It was said by Judge COLERIDGE, in *Reg.* v. *Jones*, 12 Ad. & E. 684: "There is no part of the administration of the law by justices acting on their own authority in which it is more necessary for the court to look closely at their proceedings than the stopping of highways." *Rex* v. *Marquis of Downshire*, 4 Ad. & E. 698; *Rex* v. *Justices of Kent*, 10 B. & C. 477; *DePonthieu* v. *Pennyfeather*, 6 Taunt. 634; *Rex* v. *Justices of Kent*, 1 B. & C. 622. The rights of the public in the way can only be divested by proceedings au-

thorized by law, and there must be a full and substantial compliance with all the requirements of the statute.

The reply contains, in substance, these allegations: That the plaintiff and twelve other freeholders, residents of the township in which the highway is situated, and within the immediate neighborhood of the road, petitioned the board of commissioners to vacate the way described in the answer and to locate a new one; that the part of the way sought to be vacated was on the appellant's land, and the new way petitioned for was asked to be located thereon at a point near the old; that proper notices were posted in three public places of the township, in the immediate vicinity of the highway, for more than twenty days next preceding the meeting of the board; that the board assumed and had jurisdiction of the petition, and appointed three viewers to examine the proposed vacation and new route; that, after being sworn, they did make the view, and reported in writing that the vacation of the old and the opening of the new way would be of public utility, and recommended that it be so ordered; that the report was adopted at the June term, 1882, of the commissioners' court, and that an order was made and entered vacating the old and establishing the new way; that on the first day of August, 1882, the auditor issued an order to the road superintendent to open the new road, and he did open it, and made the proper entry of record; that under that order the plaintiff cut a way for the new road, and made it as good and passable as the old was; that the board of commissioners let the contract for building the new bridge to one Alonzo Doty, and that he proceeded thereunder so far as to place a part of the material needed for the bridge on the ground, and had bought the iron work of the bridge, when the defendants abandoned the building of the bridge on the new road, and, without authority of law, proceeded to build it upon the old.

We have no brief from the appellees, and we can not ascertain on what ground the reply was held bad. In our opin-

ion there is no fatal defect in that pleading. The law fully authorizes the board of commissioners to change the line of a road by vacating the old and establishing a new road. Sec. 5049, R. S. 1881. The petitioners for the change gave the notice required by law. The provisions of the statute authorizing the change are shown to have been substantially complied with, and both the old and the new way are on the land of one person, and we are unable, therefore, to conceive any reason why there was not a valid judgment changing the location of the road by vacating the old and establishing a new way.

It is settled law that where an ordinary highway is vacated according to law, the owner of the fee is reinvested with an absolute right of dominion, and that an unauthorized entry on the land, formerly occupied as an highway, will constitute a cause of action.

A judgment or order duly made, directing the establishment of a new and the vacation of an old highway, is not one that the board of commissioners can set aside or amend at their pleasure. When the order or judgment has been made and recorded, the authority of the commissioners is exhausted, and they have no right to change or vacate it, and of course no right to disregard or ignore it. *Board, etc.*, v. *State, ex rel.*, 61 Ind. 75; *Doctor* v. *Hartman*, 74 Ind. 221; *Board, etc.*, v. *Logansport, etc., G. R. Co.*, 88 Ind. 199.

It is true that an injunction will not be granted to restrain the commission of a simple trespass, but it is also true that an injunction will lie where the entry on land is under a claim of right which might, by lapse of time, grow into a title. In this case, if the appellant had tacitly assented to the building of the bridge on the line of the abandoned highway, and a considerable period of time had elapsed without objection on his part, a dedication might have been presumed against him, and to prevent such a result he had a right to an injunction against the unauthorized use of his land for the purposes of a highway. A land-owner has a right to invoke

the strong arm of the courts to prevent a permanent wrongful occupancy or appropriation of his land. *Webb* v. *Portland Man'fg Co.*, 3 Sumn. 189; *Ross* v. *Thompson*, 78 Ind. 90; 2 Story Eq., sec. 924.

Judgment reversed.

Filed March 11, 1884.

No. 10,790.

HADLEY ET AL. *v.* HOOD ET AL.

FRAUDULENT CONVEYANCE.—*Mortgage.—Judgment.*—To a complaint by creditors to set aside a fraudulent conveyance, the grantee pleaded as a counter-claim that he took the deed in satisfaction of a mortgage on the land, taken in good faith, and praying protection as mortgagee. To this there was a general denial, and an answer that the mortgage was taken in fraud of creditors, and these issues, and also the issues on the original complaint, were found for the plaintiff.

Held, that a decree setting aside the deed and ordering a sale of the land free from any claim of the grantee was justified by the finding.

EVIDENCE.—*Harmless Error.*—To reject evidence tending to corroborate another witness as to a material fact in dispute, is a harmless error.

From the Wayne Circuit Court.

W. A. Bickle, for appellants.

C. H. Burchenal, W. D. Foulke and *J. L. Rupe*, for appellees.

BICKNELL, C. C.—The appellees were judgment creditors of Elwood Hadley. They brought this suit to set aside a deed made by Elwood Hadley to his co-defendant William B. Hadley.

Their complaint averred that after the debts of the plaintiffs had accrued, and when said Elwood Hadley was wholly insolvent, he had made said deed for the purpose of defrauding the plaintiffs and his other creditors; that said deed was made without consideration and was accepted by said William B. Hadley with full knowledge of said fraudulent purpose. The

defendants severally demurred to the complaint and said demurrers were overruled.

The defendants severally pleaded the general denial.

The defendant William B. Hadley filed a cross complaint, alleging that before the rendition of said judgment, said Elwood Hadley was indebted to him, and to secure said indebtedness gave him a note and a mortgage on the property in controversy, which were given and received in good faith; that the value of the mortgaged property was less than the amount of said indebtedness, and that, in order to save the expense of foreclosure, said Elwood, before the rendition of said judgments, had executed the deed aforesaid, which said William B. had neglected to put on record in proper time, and that the whole transaction was in good faith, and without any knowledge by William B. Hadley of the said indebtedness of Elwood Hadley, and without intent to hinder, delay or defraud any of the plaintiffs. The cross complaint prayed that if the deed should be set aside, the mortgage might be declared a prior lien to the judgments of the plaintiffs, and to foreclose.

The plaintiffs answered the cross complaint in three paragraphs, to wit:

1st. A general denial.

2d. That said note and mortgage were paid and satisfied before suit brought.

3d. That said mortgage was without consideration, and was received by said William B. Hadley with knowledge that said Elwood Hadley was at the time insolvent.

The second and third paragraphs of the answer to the cross complaint were replied to by general denial.

The issues were tried by the court, who found for the plaintiffs on their complaint, and against the defendants on their cross complaint. Judgment was rendered upon the finding that the deed was fraudulent and void as to the plaintiffs, and that the land be sold free from all claims of said William B. Hadley, and the proceeds of the sale applied, first,

in payment of costs; secondly, in payment of the plaintiffs' judgments.

The defendants severally moved for a new trial for the following reasons:

1. That the finding was contrary to law.

2. That the finding was not sustained by sufficient evidence.

3. Error at the trial in excluding certain specified testimony of the defendants.

4. Error at the trial in refusing to permit the defendants to explain a statement made in their evidence given at their private examination before the trial.

The motions for a new trial were overruled. The defendants severally moved that said judgment be modified:

1. By striking out so much thereof as is in favor of the original plaintiffs upon their answer to the cross complaint of said William B. Hadley, because the same is not authorized by the issues, and because the rights of said William B., under said mortgage, ought not to be impaired, and because so much of said judgment is not prayed for nor authorized as to said original plaintiffs.

2. By confining said judgment to declaring said deed a fraud as to said plaintiffs only, and subject to the liens of their judgments, but not to set the same aside; to modify and set aside so much of said judgment as sets aside said deed, and to modify so much as declares said deed a fraud.

3. To modify said finding and judgment which orders a copy of decree to issue to sell said land.

4. To strike out so much of said judgment as required said property to be sold free of any claims of said William B. Hadley, because the same and all the foregoing specifications are illegal and improper, unwarranted by the issues and contrary to equity and justice.

These motions to modify the judgment were overruled. The defendants appealed. They assign as errors:

1. Overruling the several demurrers to the complaint.

2. Overruling the several motions for a new trial.

3. Overruling the several motions to modify the judgment.

4. That the complaint does not state facts sufficient to constitute a cause of action.

Of these specifications of error the first and fourth are not discussed in the appellants' brief, and are therefore regarded as waived.

As to the third specification of error, the cross complaint set up a mortgage as a valid lien prior to the liens of the plaintiffs' judgments, and prayed that if the deed should be set aside the mortgage might be foreclosed. To this the answer was that the mortgage was without consideration, and was taken by said William B. Hadley when the mortgagor was insolvent, and was known by him to be insolvent. Upon this issue was joined, and the finding was in favor of the original plaintiffs, both on the complaint and on the cross complaint. There was therefore no error in rendering judgment that the deed be set aside, and that the property be sold free of any claim of said mortgage, and the other motions to modify the judgment were properly overruled. And we think there was no available error in overruling the motion for a new trial.

The fourth reason for a new trial can not be considered, because the question sought to be presented thereby was not saved by an exception.

The third reason for a new trial relates to the exclusion of evidence. An examination of said Elwood Hadley and William B. Hadley had been made privately before the trial, and at the trial it was agreed that such examination, which had been taken down in writing, should be taken as their testimony. The plaintiffs, after introducing said examinations and other testimony, called as their last witness C. C. Binkley, who testified thus, "I had claims against Elwood Hadley in 1880. I settled them at twenty cents on the dollar, and he told me that he was directed by his attorney to take an assignment of the claim." This is all of his testimony as

given in its place in the bill of exceptions. But the bill of exceptions afterwards states as follows:

"And during the progress of said trial, and after C. C. Binkley had testified, as written down by the court, that he had settled with William B. Hadley for a claim due to one of his clients, and that said William B. Hadley had paid him by his check at twenty cents on the dollar, the defendants, at the proper time, after the close of the plaintiffs' evidence, and while defendants were offering their evidence, and after said William B. Hadley had testified denying such settlement, offered to prove by said Elwood Hadley, who was then on the witness stand testifying, that it was he, said Elwood, who had settled with and paid said Binkley by William Hadley's check, to which plaintiffs objected, and the defendants stated to the court that the evidence of said Binkley had been offered, they supposed, to prove that said William B. Hadley had knowledge of said Elwood's failure, and was compromising his liabilities, and they could prove the fact as above stated by said Elwood, in that instance, that he, and not said William, settled with said Binkley, to corroborate said William, but the court sustained said objection, and refused to permit said witness to testify to said facts, to which ruling the defendants at the time excepted." If there was any error in this ruling, it was a harmless error, which could not in any way have affected the result of the cause. *Bunnell* v. *Studebaker*, 88 Ind. 338. The first and second reasons for a new trial present the question as to the sufficiency of the evidence.

It may be said that there was a conflict in the testimony, because both the defendants testified that they had no intention to defraud, and William B. Hadley testified that when he took the deed he did not know of the existence of the debts of the creditors, whose names are stated in the complaint; but there was testimony tending to support the finding, and in such a case the judgment can not be disturbed. *Arnold* v. *Wilt*, 86 Ind. 367; *Kelly* v. *Lenihan*, 56 Ind. 448.

There is no available error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things, affirmed, at the costs of the appellants.

Filed March 12, 1884.

No. 10,963.

TEEPLE v. DICKEY.

REPLEVIN.—*Judgment on Dismissal.—Possession.*—A replevin suit before a justice was dismissed for want of a sufficient bond, and a judgment of return rendered, the plaintiff having had the property delivered to him by virtue of the writ. Without first restoring the property the plaintiff began another suit.

Held, that when the second suit was begun the property was constructively in the defendant's possession.

COSTS.—*Witnesses.—Change of Venue.*—Where witnesses are subpœnaed and attend before a justice of the peace, but are not used because of a change of venue taken by the defendant, the costs thereof are taxable to the defendant where he is the losing party.

SAME.—*Practice.*—The Supreme Court will not consider the action of the court below in refusing to tax the fees of certain witnesses of the appellee to him, where the record does not show that fees were claimed by such witnesses or taxed at all.

From the Fulton Circuit Court.

H. R. Robbins and *J. L. Cook*, for appellant.

M. A. O. Packard and *O. M. Packard*, for appellee.

HAMMOND, J.—Action of replevin by the appellee against the appellant, commenced before a justice of the peace in Marshall county. A change, on the appellant's motion, was taken to another justice, before whom the trial resulted in a judgment for the appellee. The appellant appealed to the Marshall Circuit Court, and thence, on his motion, the venue was changed to the court below, where, upon a trial by the

court, there was also a finding and judgment for the appellee. The appellant's motion for a new trial, on the ground that the finding was not sustained by sufficient evidence, was overruled; an exception was taken; and this ruling is assigned for error.

The following facts were established by the evidence: The property in controversy, a mare and one set of double harness, while owned by and in the possession of the appellee, were wrongfully and forcibly taken from him by the appellant. The appellee filed before a justice of the peace a complaint and bond for the recovery of the property, and on the writ issued by the justice the property was restored to the appellee. The parties appeared before the justice, and on the appellant's motion the case was dismissed because of the insufficiency of the bond.

The appellee then commenced the present action by filing another complaint and bond for the recovery of the property. Another writ of replevin was issued and placed in the hands of the constable. The appellee, accompanied by the constable, went to the appellant with the property, returned it to and then demanded it of him. The demand being refused, the constable, under the second writ, again restored the property to the appellee.

It is claimed by the appellant's counsel that the evidence fails to show that the appellant had possession of the property when the present action was commenced, and that for this reason the finding of the court was erroneous.

It is true that to maintain an action of replevin the evidence must show that the defendant was in possession of the property at the time of bringing the suit. The possession, however, need not be actual. Constructive possession by the defendant is sufficient. *Louthain* v. *Fitzer*, 78 Ind. 449; *Hadley* v. *Hadley*, 82 Ind. 75.

In a replevin action before a justice of the peace, if the case is dismissed, the justice renders judgment for the return of the property to the defendant. Section 1550, R. S. 1881.

The appellant, in the first instance, obtained unlawful possession of the property. The judgment on the dismissal of the suit did not determine the question of ownership. It simply placed the parties *in statu quo*, leaving their legal rights to be ascertained the same as if the dismissed suit had not been commenced. The judgment on the dismissal for the return of the property to the appellant placed it constructively in his possession. It was necessary for the appellee to bring another action to establish his ownership and right of possession. This we think he might do without first restoring the actual possession to the appellant. The finding of the court for the appellee was correct.

Before the appellant took a change from the first justice before whom the present action was commenced, the appellee had a number of witnesses summoned for the time fixed for the trial. On account of the change the witnesses, of course, were not used at that time. The appellant moved in the court below to have the costs of these witnesses taxed to the appellee. The motion was properly overruled.

The appellant also moved that the fees of certain witnesses summoned in the court below by the appellee be taxed to him. This motion was overruled. It is sufficient to say in vindication of the ruling, that it does not appear that the fees of these witnesses were taxed to the appellant, nor, in fact, that they were claimed by the witnesses. A party will not be heard in this court to complain of the rulings of the trial court without showing affirmatively by the record, that he was in some way harmed thereby.

Judgment affirmed, at appellant's costs.

Filed March 11, 1884.

No. 10,913.

PIERCE v. SPEAR ET AL.

JUDGMENT.—*Lien.—Priorities.—Sheriff's Sale.— Deed.—Title.*—Lands were conveyed in good faith by A., but the purchaser neglected to have the deed recorded. Two judgments were afterwards rendered against A., and upon execution issued upon the junior judgment there was a sale of the land to a purchaser who had no notice of the conveyance, and in proper time a sheriff's deed was made to him, which was recorded. A like sale and deed were afterwards made under the senior judgment to a purchaser without notice.

Held, that the judgments were not liens upon the land. R. S. 1881, sections 608, 752.

Held, also, that the purchaser at the first sheriff's sale took title, and the purchaser at the second sale, though under the senior judgment, took nothing.

From the Scott Circuit Court.

C. L. Jewett and *H. E. Jewett*, for appellant.

C. B. Harrod, for appellees.

BLACK, C.—The appellant sued the appellees, James W. Spear, Zerelda C. Spear, Mary J. Phillips and Addison Phillips, husband of said Mary, to recover possession of certain real estate in Scott county.

It is assigned that the court erred in its conclusions of law in a special finding. The court concluded that the law was with the defendants on facts which, omitting some particulars for the sake of brevity, were in effect as follows:

The appellee James W. Spear, in the spring of the year 1876, being in possession of the land in question and claiming title thereto, conveyed it by deed, for a valuable consideration, to his daughters, the appellees Zerelda C. Spear and Mary J. Phillips. Said deed was duly executed and acknowledged by said James W. Spear, but it has never been recorded. Said grantor, who was unmarried when he made the deed, has remained in possession, and said Zerelda, who is unmarried, has always lived with her father. Said Mary was

then and she still is the wife of the appellee Addison Phillips, and was residing in the neighborhood.

In October, 1878, one Sarah E. Thompson obtained a judgment in the court below against said James W. Spear for $283.98, without relief from valuation or appraisement laws, and costs. Under an execution issued on this judgment said land was duly sold by the sheriff as the property of said judgment defendant, in February, 1879, for $398.75 to said judgment plaintiff, to whom the sheriff gave a certificate of purchase, and to whom, in March, 1880, the sheriff executed his deed, which in the same month was recorded in the office of the recorder of said county. In January, 1881, said Sarah E. Thompson and her husband conveyed said real estate by quitclaim deed to the appellees Zerelda and Mary, for a valuable consideration, and this deed was recorded in said recorder's office in October, 1881.

In August, 1877, one James A. Graves obtained a judgment in said court against said James W. Spear for $86.90, without relief, etc., and costs.

Under an execution issued on this judgment the sheriff, in September, 1881, duly sold said real estate as the property of the judgment defendant, on a levy made in August, 1881, to one James Graves (not the judgment plaintiff) for $141, and issued a certificate of sale to said purchaser. In September, 1882, the sheriff executed his deed for said real estate to the appellant, to whom the purchaser, said James Graves, had assigned his certificate; and in the same month this deed was recorded in said recorder's office.

The appellant and said Mrs. Thompson took their said deeds without notice of the conveyance of said James W. Spear to his said daughters.

By section 608, R. S. 1881, it is provided, as it was by section 527, code of 1852, that "All final judgments in the Supreme and Circuit Courts for the recovery of money or costs shall be a lien upon real estate and chattels real, liable to execution in the county where the judgment is rendered, for

the space of ten years after the rendition thereof, and no longer, exclusive of the time during which the party may be restrained," as by said section specified.

By section 752, R. S. 1881, it is provided, as in section 526, code of 1852, that " The following real estate shall be liable to all judgments and attachments, and to be sold on execution against the debtor owning the same or for whose use the same is holden, viz.:

"*First.* All lands of the judgment debtor, whether in possession, remainder, or reversion.

"*Second.* Lands fraudulently conveyed with intent to delay or defraud creditors.

"*Third.* All rights of redeeming mortgaged lands; also, all lands held by virtue of any land-office certificate.

"*Fourth.* Lands, or any estate or interest therein, holden by any one in trust for or to the use of another.

"*Fifth.* All chattels real of the judgment debtor."

Section 2931, R. S. 1881, being section 16, p. 365, 1 R. S. 1876, provides that " Every conveyance or mortgage of lands or of any interest therein, and every lease for more than three years, shall be recorded in the recorder's office of the county where such lands shall be situated; and every conveyance or lease, not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration."

And section 2926, R. S. 1881, being section 11, p. 364, 1 R. S. 1876, provides that " No conveyance of any real estate in fee simple or for life or of any future estate, and no lease for more than three years from the making thereof, shall be valid and effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it is made by a deed recorded within the time and in the manner provided in this act."

Not only is a purchaser of real estate on execution, other

than the execution plaintiff, who buys in good faith and without notice, protected as a *bona fide* purchaser for a valuable consideration against prior equities and unrecorded deeds, but in this State the doctrine prevails, though not without opposition, that the purchaser at such a sale is so protected, though he be the execution creditor. *Vitito* v. *Hamilton*, 86 Ind. 137, and cases there cited.

Before the rendition of either of the judgments in question, the real estate in dispute had been conveyed for value by the judgment defendant to his daughters. It was not within the statute designating what real estate is liable to be sold on execution, and, therefore, it was not within the statute prescribing on what real estate a judgment may be a lien. But the conveyance of the father to the daughters not having been recorded, it was, under said section 2931, R. S. 1881, fraudulent and void as against a subsequent purchaser in good faith and for a valuable consideration. This statute did not render said conveyance of the father void as against any one other than a subsequent purchaser, lessee or mortgagee. So far as this statute alone applied, the conveyance of the father was valid not only against him, but also against his subsequent judgment creditors; but it was invalid as against either purchaser under execution. *Sparks* v. *Bank*, 7 Blackf. 469; *Orth* v. *Jennings*, 8 Blackf. 420.

Under said section 2926, the conveyance was invalid as against any person other than the grantee, his heirs, devisees and persons having notice, and said judgment creditors were none of these.

But neither of the judgments was a lien on said real estate, and, therefore, the older judgment, under which the appellant claims, had no superiority over the junior one, as to this real estate. When the land was sold under the senior judgment, it had been sold and conveyed by the sheriff to the other judgment creditor, whose deed had been recorded. As against this conveyance, the purchaser under the senior judgment took nothing.

The appellees Zerelda and Mary hold the title thus acquired by the junior judgment creditor. Therefore the plaintiff, who could only recover on the strength of his own title, did not establish a right to recover possession of any of the defendants. See *Norton* v. *Williams*, 9 Iowa, 528; *Bell* v. *Evans*, 10 Iowa, 353.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed March 12, 1884.

No. 11,096.

THE JOHNSTON HARVESTER COMPANY *v.* BARTLEY.

PLEADING.—*Complaint.—Statement of Facts.—Demurrer.—Motion.*—Where the complaint omits a material fact necessary to the plaintiff's cause of action, a demurrer for the want of sufficient facts will be sustained; but the only remedy for a defective or imperfect statement of facts is a motion to make the complaint more certain and specific in that respect.

LOST INSTRUMENT.—*Proof of Contents.—Preponderance of Evidence.*—Where the action is upon a written instrument alleged to be lost, the loss of such instrument, like any other fact stated in the complaint, is to be established by a fair preponderance of the evidence before parol proof of the contents of the instrument is admissible.

PRACTICE.—*Weight of Evidence.—Supreme Court.*—The verdict will not be disturbed by the Supreme Court on the weight of the evidence.

From the Noble Circuit Court.

T. M. Eells, for appellant.

H. G. Zimmerman and *L. W. Welker*, for appellee.

HOWK, C. J.—This was a suit by the appellee, Bartley, against the appellant, to recover damages for an alleged breach of warranty in the sale of a Johnston Harvester and Johnston Mower. The case is here for the second time. See *Johnston Harvester Co.* v. *Bartley*, 81 Ind. 406. When the cause was remanded, the appellee filed an amended complaint, counting on the appellant's written warranty of the harvester and

mower. Appellant's demurrer to the complaint having been overruled, it answered by a general denial of the complaint, with an agreement that all matters of defence or reply might be given in evidence without having been specially pleaded. The trial of the issues by a jury resulted in a verdict for the appellee; and, over the appellant's motion for a new trial, judgment was rendered accordingly.

Errors are here assigned by the appellant, which call in question the decisions of the circuit court, (1) in overruling its demurrer to the complaint, and (2) in overruling its motion for a new trial.

In discussing the sufficiency of the complaint the first point made by appellant's counsel is, that "the complaint shows no consideration for the warranty." On this point the allegation of the complaint is, that, as a part of appellant's contract for the sale and delivery to appellee of the harvester and mower, for the price agreed upon, it "executed and delivered to the plaintiff a written warranty, whereby," etc. Surely, this allegation shows a sufficient consideration for the warranty. Appellant's counsel next claims that "the complaint does not allege sufficiently that the terms of the warranty were broken or failed." It is not claimed that the complaint fails to show a breach of the warranty; but the claim is that the breach is not shown "sufficiently," and this, too, without pointing out wherein the showing is insufficient. The objection to the allegation is not pointed out, and, therefore, is not considered. So, we may also say, in reference to the other objections of appellant's counsel to the sufficiency of the complaint, they relate, not to the omission of any material fact, but to defective or imperfect statements of facts alleged in the complaint. In such case the remedy of the objecting party is a motion to make the defective or imperfect statements of facts more certain and specific, and not a demurrer for the want of facts. This is settled by many decisions of this court. *Hyatt* v. *Mattingly*, 68 Ind. 271; *Nowlin* v. *Whipple*, 79 Ind. 481; *Wright* v. *Williams*, 83 Ind. 421.

The demurrer to the complaint was correctly overruled.

The first cause assigned by appellant for a new trial, in his motion therefor, was error of law, occurring at the trial, in permitting the appellee to testify, over the appellant's objections, to the contents of the written warranties alleged in the complaint to be lost. It is earnestly insisted, on behalf of the appellant, that appellee's evidence in relation to the loss of the written warranties and his inability to produce them on the trial was not sufficient to authorize the admission of parol evidence of the contents of such warranties. Appellee testified that appellant's agent had given him a written warranty of the harvester and a written warranty of the mower, both of which warranties were signed by the appellant, and also by one William R. Knox, as appellant's agent. Appellee further testified substantially as follows:

"I do not know where the warranties are. In 1877 I put the warranties mentioned in the complaint in the hands of Thomas D. Evans, an attorney at law, then residing at Albion, Indiana, and ordered him to bring an action on them. Afterwards I went to Mr. Evans's office and requested him to hand me the warranties. Mr. Evans, in my presence, made a thorough search in his office, and where they ought to have been found, for the warranties, but could not find them. I do not know where Mr. Evans now resides. I wrote to him where I supposed he resided, but never heard from him. I have always been unable to find said warranties, although I made every effort in my power to find him."

Appellee was then asked by his counsel "to state the contents of the warranties;" and to this the appellant objected "on the ground that the loss of the warranties was not sufficiently proven to authorize the admission of parol testimony of their contents." But the court overruled the objection and allowed the appellee to state to the jury the contents of the warranties, and to this ruling the appellant excepted.

We are of opinion that the court committed no error in the admission of parol evidence of the contents of the writ-

ten warranties over the appellant's objection. We have set out all the evidence in the record in relation to the loss of the written warranties. This evidence certainly justified the court in finding, as it must have done, that the written warranties were lost and could not be produced by the appellee. The loss of the warranties, like any other fact alleged in the complaint, was to be established by the appellee by a fair preponderance of the evidence, and this, we think, was done. *Millikan* v. *State, ex rel.*, 70 Ind. 310.

The other causes for a new trial were, in substance, that the verdict was not sustained by sufficient evidence and was contrary to law, and that the damages assessed were excessive. None of these causes for a new trial are available to the appellant in this court, for the evidence tends to sustain the verdict on every material point; the verdict is not contrary to law, and the damages are not shown to be excessive. In such a case, under the settled practice of this court, the verdict will not be disturbed, nor the judgment reversed, on what might seem to be the weight of the evidence. *Cornelius* v. *Coughlin*, 86 Ind. 461.

We find no error in the record.

The judgment is affirmed, with costs.

Filed March 11, 1884.

No. 11,053.

INGALLS v. BYERS, ADMINISTRATOR, ET AL.

RAILROAD.—*Right of Way.—Deed.—Condition.—Failure to Build.—Mortgage.—Subsequent Condemnation.*—A deed to a railroad company recited that, "in consideration of the location and construction of" its railway, right of way was granted "so long as it shall be required for the uses * of said" company. The latter mortgaged the right of way; the railroad was never constructed, and, upon foreclosure, the mortgaged premises were sold to T., who conveyed to I. Subsequently, another company condemned the right of way and paid the money into court, when suit

was brought by I. against the administrator of the estate of the grantor, to recover the money so paid into court.

Held, that the administrator is, and I. is not, entitled to recover.

From the Decatur Circuit Court.

J. K. Ewing, C. Ewing, T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and *E. Daniels*, for appellant.

S. B. Eward, D. A. Myers, J. D. Miller and *F. E. Gavin*, for appellees.

ELLIOTT, J.—James B. Byers executed to a corporation, known as the Cincinnati and Terre Haute Railway Company, a deed, of which, omitting the formal parts, the following is a copy: "Know all men by these presents that James Byers and Sarah A. Byers, his wife, in consideration of the location and construction of the Cincinnati and Terre Haute Railway, and ——— dollars to them in hand paid, do give grant, bargain, sell and convey to the said company the right of way for the use of the said railway over and across the east half of the northwest quarter of section eleven, town ten, range eight, in Decatur county. Said company is to keep a good, substantial fence on each side of said road through these premises, and if at any time they shall be destroyed by fire, or by any other cause, the company shall repair the same within a reasonable time or forfeit its right to the use of the same, for the width or space of forty-nine and one-half feet on each side of the center line of the said railway as now, or as may be hereafter located, making ninety-nine feet in width, and for the length the distance between the limits of said tract, to include also the right of said company to take materials for the construction and repairs of said railway at any point in said forty-nine and one-half feet of said center line, together with the right of way over said tract of land sufficient to enable said company to construct and repair its railway. To have and to hold said rights and privileges to the use of the said company so long as it shall be required for the uses and purposes of said railway company, in as full and

ample a manner as may be required for that purpose. The grantors have been fully paid for the damages done their property by the location and construction of said railway."

After the execution of this deed some work was done by the grantee upon the strip of land granted, but the railway was never built. In October, 1871, the grantee executed a mortgage covering all its property, rights and franchises. This mortgage was duly foreclosed, and in 1878 sale was made on the decree, and William B. Tuell purchased all the property, rights and franchises of the corporation, and he conveyed to the appellant. In July, 1882, the Columbus, Hope and Greensburgh Railroad Company appropriated fifty feet of the same strip of ground described in the Byers deed, and paid the damages assessed, $416, into court. The dispute is as to the right to this money, does it belong to Ingalls or to the administrator of the Byers estate?

It is clear that Ingalls succeeded to the rights of the Cincinnati and Terre Haute Railway Company, for a purchaser at a sale upon the decree of foreclosure takes all that the mortgage authorizes. Jones R. R. Securities, section 633. The rights of such a purchaser are strictly analogous to those of purchasers at ordinary foreclosure sales.

The deed executed by James B. Byers does not purport to convey a fee; on the contrary, its language clearly imports an intention to convey an easement to the grantee for a particular purpose. It is, therefore, unnecessary to consider what would be the rights of the parties in the event that a conditional fee had been conveyed.

The consideration of the grant was the location and operation of the Cincinnati and Terre Haute Railroad and the erection and maintenance of fences as provided in the deed. This was not merely a condition subsequent, but it is the consideration which gives effect to the deed. The promise of the grantee to the grantor stood to him as compensation. If we can declare that the compensation was paid, then we must hold that the appellant has the right of this contro-

versy; if otherwise, then we must hold that the right is with the appellee. This we say because the rule is that the grantee does not, where all the facts are known, secure title until compensation is paid. This is so upon the closest analogy. If a vendee takes with notice of a vendor's lien, he can get no title as against the lien. Although a mortgagee of a railroad corporation takes the right to appropriations of land made by the mortgagor, no rights attach to land in cases where the compensation has not been paid. The payment of the compensation is essential to vest title. Jones R. R. Sec., section 633. It appears here, not only that compensation has not been paid, but that it will not be paid. The appellant, as the successor of the original grantee, is not claiming a right to build a railroad and thus yield the compensation for which the grantor bargained, but he expressly abandons the right of way and yields to the claims of a corporation that has condemned the land, and demands the money which that corporation has paid as damages. We are unable to see the slightest justice in his claim. He seeks the money for land for which neither he nor his grantors have paid consideration, and that, too, where it affirmatively appears that he has neither the power nor the will to pay it. If the appellant were claiming as the successor of the Cincinnati and Terre Haute company and was proposing to build the road for which the easement was granted, we should have a very different question and one upon which the cases of *Junction R. R. Co.* v. *Ruggles*, 7 Ohio St. 1, and *Paul* v. *Connersville, etc., R. R. Co.*, 51 Ind. 527, would have an important bearing, but he makes no claim of that kind. The purpose of the original grant was to secure the railroad there described, and not some other road, but, if it had been, the grant secured no other road; the condemnation proceedings did this, so that the land-owner has had nothing of benefit from appellant or his grantors, nor can he have. The mere fact that a railroad will be built gives appellant no claim, for he has done nothing to aid in its location or construction, nor are its builders claiming

through him; on the contrary, they claim through an altogether distinct and different right, and one which, so far from confirming that of appellant, directly refuses to give it recognition.

The appellant's claim is to money paid upon proceedings which directly repudiate his assertion of title, for the very purpose of the condemnation proceeding was to secure title from a source different from the grant to appellant's remote grantor. It is, therefore, not owing to him that the Columbus, Hope and Greensburgh company undertake to build the railroad, nor does he contribute to that result, but, on the contrary, that result flows from the annihilation of his claim of title by the acquisition of the right of way through a distinct and different source, to which right he fully surrenders.

Judgment affirmed.

Filed Nov. 7, 1883. Petition for a rehearing overruled March 12, 1884.

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No. 11,106.

HOGAN ET AL. *v.* ROBINSON.

PARTIES.—*Appeal.*—It is only parties affected by the judgment who are required by statute to be made parties to an appeal to the Supreme Court.

STATUTE OF LIMITATIONS.—*Demurrer.*—*Pleading.*—*Practice.*—The statute of limitations is not available on demurrer to a complaint, unless it directly appears by the complaint that the case is not within any of the exceptions to the statute.

FRAUDULENT CONVEYANCE.—*Complaint.*—For a good complaint by a creditor, to set aside a conveyance of his debtor made to defraud creditors, see opinion.

SAME.—*Evidence.*—*Declarations.*—In such case declarations of the debtor made after the conveyance were proper evidence to show his intent.

SAME.—*Husband and Wife.*—A conveyance to a wife for full value in payment of money borrowed from her, without notice of any fraudulent intent, is good as against other creditors.

SAME.—*Burden of Proof.*—A conveyance can not be impeached for fraud by creditors, if the debtor retain ample property, in his own name, subject to execution, to satisfy all his debts, and upon this subject the burden of proof is on the creditor who attacks the conveyance.

From the Clark Circuit Court.

J. K. Marsh and *D. C. Anthony*, for appellants.
J. H. Stotsenburg and *M. C. Hester*, for appellee.

COLERICK, C.—This action was brought by the appellee and others against the appellants, to set aside, as fraudulent, certain deeds of conveyance. The complaint, in substance, averred that the appellant Harrison Hogan was, on the 14th day of October, 1875, the owner of certain real estate, describing it, and being indebted to the appellee in the sum of $100, and to other persons in sums mentioned, did, on said day, for the purpose of hindering, delaying and defrauding his creditors, execute, with his wife Mary Hogan, one of the appellants, a deed of conveyance for said real estate to the appellant Marsh, who afterwards, on the 20th day of October, 1875, for the purpose of aiding said Harrison Hogan in accomplishing his said fraudulent purpose, and at his instance and request, conveyed said real estate to said Mary Hogan; that although said deeds purported to be made in consideration of the sum of $6,000, they were, in fact, wholly voluntary, and made without any valuable consideration, and that at the time of their execution the grantees had full knowledge of the fraudulent intent and purpose of Harrison Hogan; that said Hogan, at the time of the execution of the deed to Marsh, "had no other property subject to execution out of which his then existing indebtedness could be made, nor has he since acquired, nor has he now, such other property, subject to execution, out of which his said indebtedness can be made;" that on the 19th day of April, 1880, a judgment was rendered against him in favor of the appellee in the Clark Circuit Court for $100, "due said Robinson as aforesaid," and that other judgments, naming the parties in whose favor they existed and the dates and amounts thereof, were rendered against him, all of which judgments were in full force and unpaid. Wherefore the plaintiffs prayed that said deeds be set aside as fraudulent, and said real estate sold to pay said judgments in the order of their priority, and other relief. To this com-

plaint the appellants filed an answer of general denial. The case was tried by a jury, and resulted in a verdict in favor of the appellee. A motion for a new trial was made and overruled, and from the judgment which was rendered on the verdict the appellants appealed, and assign as errors for its reversal:

1. That the complaint does not state facts sufficient to constitute a cause of action against them, or either of them.

2. That the court erred in overruling the motion for a new trial.

Before considering the questions presented by the appellants it is necessary to dispose of a motion which has been interposed by the appellee to dismiss the appeal, for the reason that David F. McGill and Thomas G. Thuman, who united with the appellee in bringing the action, were not made parties to the appeal, and have not been notified thereof. The record shows that Chapin Hall, Charles Eddy, David F. McGill and Thomas G. Thuman joined with the appellee in commencing this action, and also shows that afterwards the action was dismissed as to Hall and Eddy, on their own motion. McGill and Thuman introduced no evidence on the trial, and for some cause, not explained in the record, abandoned the prosecution of the action, although no formal entry of dismissal as to them was made. During and after the trial the appellee was treated as the sole plaintiff in the action. The judgment against the appellants was rendered in favor of the appellee alone. McGill and Thuman were not parties to the judgment, and, therefore, are not necessary parties to the appeal, which is from a judgment that does not, and can not, affect them in any possible manner. *Hammon* v. *Sexton*, 69 Ind. 37; *Easter* v. *Severin*, 78 Ind. 540. The case of *Hunderlock* v. *Dundee Mortgage, etc., Co.*, 88 Ind. 139, cited by the appellee in support of his motion, is in harmony with the cases above cited. It holds, as in the cases cited, that all the parties to, and affected by, the *judgment* must be made parties to the appeal. The word "parties," as

used in the statute relating to appeals to this court, is to be construed as meaning parties to the judgment, and not merely parties to the action. The appellee's motion to dismiss the appeal is overruled.

No demurrer to the complaint was filed in the court below, nor was a motion in arrest of judgment made. The sufficiency of the complaint is questioned for the first time in this court. The objections now presented to it by the appellants are: *First.* That it appears on the face of the complaint that the cause of action therein set forth was barred at the time of the commencement of the suit; *Second.* That the complaint does not aver that Harrison Hogan was insolvent at the time of the execution of the deed by Marsh to Mary Hogan, nor allege that he was at that time indebted to any person.

The question of the statute of limitations may be raised by demurrer, where the complaint shows, on its face, that the action is commenced after the time limited, and that none of the exceptions provided in the statute in that class of cases exist. See Works Pr., section 306, and the decisions of this court there cited.

This action was commenced on the 16th day of March, 1882, being more than six years after the execution of the deeds of the conveyance, for the setting aside of which, as fraudulent, the action was brought. The statute of limitations provides that actions "for relief against frauds" shall be commenced within six years after the cause of action has accrued, and not afterwards. R. S. 1881, section 292. But many exceptions are made in the statute, the existence of any one of which will take the case out of its operation. In *Potter* v. *Smith*, 36 Ind. 231, it was said that "The statute contains various exceptions, as the disability of the plaintiff, non-residence of the defendant, etc.; and where such is the case, it is the settled rule that the statute, if relied upon, must be pleaded, unless, indeed, the complaint shows affirmatively that the plaintiff is barred, notwithstanding

the exceptions. The reason is, that the case may be within some of the exceptions, and the plaintiff is not bound to anticipate the defence of the statute and show his case to be within the exception without knowing that such defence will be made. Upon the statute being pleaded, he may reply the exception." See, to the same effect, *Harlen* v. *Watson*, 63 Ind. 143; *McCallam* v. *Pleasants*, 67 Ind. 542; *Harper* v. *Terry*, 70 Ind. 264; *Dunn* v. *Tousey*, 80 Ind. 288; *Wilson* v. *Ensworth*, 85 Ind. 399; *Cravens* v. *Duncan*, 55 Ind. 347; *Kent* v. *Parks*, 67 Ind. 53; *Lucas* v. *Labertue*, 88 Ind. 277.

While the better practice is to require the statute to be pleaded in all cases, still the exception, to which we have referred, under our practice exists, but, in order to make it available, it must clearly and explicitly appear on the face of the complaint, that none of the exceptions named in the statute exist. The non-existence of all the exceptions does not appear on the face of the complaint in this action; the exclusion or absence of any of them only appears inferentially. We think that the question is not presented by the complaint in such manner as to be of any avail to the appellant.

The allegation in the complaint as to the insolvency of Harrison Hogan at the time the last deed was executed is sufficient. It is averred that at the time of the execution of the first deed he "had no other property, subject to execution, out of which his said then existing indebtedness could be made, nor has he since acquired, nor has he now, such other property, subject to execution, out of which his said indebtedness can be made." This allegation covers the time when said deed from Marsh to Mary Hogan was made, which was five days after the execution of the deed to Marsh. It also appears by the complaint that on the 15th day of October, 1875, when the deed to Marsh was executed, Hogan was indebted to the appellant Robinson in the sum of $100, for which indebtedness judgment was afterwards, on the 19th day of April, 1880, rendered against him for said sum. This shows a continuous indebtedness in favor of Robinson from the time of

the execution of the deed to Marsh until, and after, the rendition of said judgment, embracing the time that the deed from Marsh to Mary Hogan was made. The complaint was sufficient.

Did the court err in overruling the motion for a new trial? The causes assigned in support of the motion were:

1. That the verdict was not sustained by sufficient evidence, and was contrary to law.

2. That the court erred in permitting the appellees to prove by George Wood that Harrison Hogan, in 1877, sold certain personal property to the witness, without any consideration therefor, and that he sold it to Hogan's son, and that said Hogan owned no personal property from 1877 to 1880, inclusive.

3. That the court erred in permitting the appellants to introduce in evidence the tax-duplicates of Clark county from 1875 to 1882, inclusive, to show what personal property Harrison Hogan owned in those years.

4. That the court erred in permitting the appellants to prove by Jacob Robinson and other witnesses the declarations and statements of Harrison Hogan made after the execution of the deed in controversy, as to his purpose in making the same.

The rule of this court, so often proclaimed, declaring that a verdict will not be disturbed where the evidence tends to support it, does not embrace a case where a verdict has been rendered in favor of the plaintiff in an action, and the record shows an entire absence of evidence supporting, or tending to support, some material and indispensable fact necessary to be proved by him to justify the rendition of a verdict in his favor. The material facts averred in the complaint in this action, and which the appellees were required to prove to entitle them to recover, were:

First. That the deeds of conveyance in the complaint mentioned were executed to hinder, delay or defraud the creditors of Harrison Hogan.

Second. That they were executed without any valuable consideration therefor, or, if executed for a valuable consideration, that the grantees, at the time of their execution, were aware of the fraudulent intent of Hogan.

Third. That at the time of the execution of said deeds, and the commencement of this action, Hogan did not own sufficient other property, subject to execution, to pay his debts.

We have carefully examined all the evidence in the record, and find that Harrison Hogan, at the time of the execution of the deeds, was indebted to his wife Mary Hogan in the sum of $3,000, for money loaned to him by her, and that the real estate conveyed to her by Marsh, who merely acted as the medium through whom the legal title of Harrison Hogan thereto was transmitted to her, was of the value of about $6,000, but was then incumbered by mortgages amounting in all to about $3,000, and that said real estate was conveyed subject to said liens, which constituted a part of the consideration for said conveyance, and that it was conveyed to her in the manner stated to satisfy her debt, which, in amount, was not less than the value of said real estate so incumbered. These facts were not disputed or controverted on the trial. The evidence in the record as to the purpose of Harrison Hogan in causing said real estate to be conveyed to his wife is conflicting, but there is no evidence showing, or tending to show, that she was aware of any fraudulent intent on his part, or that he was indebted to others at the time. It has been decided by this court that if a wife is a creditor of her husband, he has a right to prefer her to other creditors, by giving her money or property at a fair price in discharge and payment of her claim, and that although the controlling motive inducing him to do so is to place the property beyond the reach of his other creditors, yet, if the wife is ignorant of such purpose on his part, and does not participate therein, and especially if she does not know that he is indebted to others, she must be regarded as an innocent purchaser for a valuable consideration. *Brookville Nat'l Bank* v. *Kimble*, 76 Ind. 195.

It is also conclusively shown by the evidence, that at the time of the execution of said deeds of conveyance Harrison Hogan owned other property, subject to execution, amply sufficient to pay all his debts. He then owned three other tracts of land and two town lots, of the aggregate value of about $3,000, upon which mortgages, amounting in all to about $1,500, existed, and also then owned unincumbered personal property worth not less than $2,000. The estimates of the value of the personal property, as given by witnesses on both sides, varied, but no witness, on either side, fixed its value at less than $1,500. The appellee's own witnesses estimated its value at from $2,000 to $5,000. No evidence was introduced showing that Harrison Hogan was, at the time of the execution of said conveyances, indebted to any person other that the appellant, whose debt only amounted to about $100, and persons whose claims were amply secured by mortgages. In *Pennington* v. *Flock*, 93 Ind. 378, it was held that one who retains sufficient property to pay his debts may do as he pleases with the residue of his property; he may, if he chooses, give it away, and his creditors have no ground of complaint as long as he keeps in his own name sufficient property subject to execution to pay their debts, and one who attacks a conveyance on the ground of fraud must prove the insolvency of the grantor.

The evidence was clearly insufficient to sustain the verdict. The motion for a new trial, for that reason, ought to have been sustained by the court, and error was committed in overruling it.

In view of the conclusions which we have reached, it is unnecessary to consider the sufficiency of the other reasons assigned for a new trial. We think, however, that no error was committed in permitting the evidence therein mentioned to be introduced. It may not have been competent evidence against Mary Hogan, but it was against Harrison Hogan, for the purpose of showing or tending to show his intent in caus-

ing said real estate to be conveyed to his wife, and his financial condition after the execution of the deeds of conveyance. *Bruker* v. *Kelsey*, 72 Ind. 51.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellee, with instructions to the court to grant the motion for a new trial, and for further proceedings in accordance with this opinion.

Filed March 12, 1884.

No. 10,591.

HARBIN v. KETRON.

From the Knox Circuit Court.

H. S. Cauthorn, J. M. Boyle and *C. M. Wetzel*, for appellant.

BICKNELL, C. C.—A writ of mandate was issued to the judge of the Knox Circuit Court requiring him to sign and file a true bill of exceptions in this cause. The return to the writ showed that the judge had filed a true bill of exceptions in the clerk's office of the Knox Circuit Court, in obedience to the writ, and thereupon further proceedings on the mandate were discontinued. The said bill of exceptions was afterwards brought here by *certiorari*. The appellee brought this suit against the appellant and one Rufus M. Steffey to set aside a deed purporting to have been executed by her, for the reason that it was a forgery. The plaintiff dismissed the suit as to the defendant Steffey. Issues were joined between the plaintiff and the defendant Harbin, which were tried by a jury, who found for the plaintiff, and, over a motion by Harbin for a new trial, judgment was rendered for the plaintiff. Harbin appealed. He has filed a brief in which he alleges that the bill of exceptions shows on its face that it is incomplete, and that he can show by numerous affidavits that it is not a true bill, by reason of the fault of the other party, and therefore he asks this court either to reverse the judgment and award a new trial, or else to set aside the order dis-

charging the trial judge in the mandate proceedings, and to require said judge to answer the writ of mandate "so as to give a bill of exceptions which this court can recognize as such." But a bill of exceptions, signed by the judge as a true bill, can not be attacked in this way. *Beavers* v. *State*, 58 Ind. 530. And as the appellant has not made any assignment of errors his appeal must be dismissed. *Vaughn* v. *Ferrall*, 50 Ind. 221.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the appeal in this cause be, and the same is, hereby, dismissed, at the costs of the appellant.

Filed March 12, 1884.

No. 11,528.

SANDERS v. THE STATE.

94 147
151 259

CRIMINAL LAW.—*Insanity.—Presumption.—Instructions.*—It is not error to instruct, *in a prosecution for murder*, that every man is presumed to be sane and to intend the natural and usual consequences of his own acts.

SAME.—*Intoxication.*—Voluntary intoxication is no excuse for crime.

SAME.—*Insanity.*—Ungovernable passion is not insanity, and one whose power of will is not impaired by disease, and who, yielding to passion, slays another, is subject to the punishment fixed by law.

SAME.—*Presumption.—Evidence.*—The legal presumption of sanity stands until the defendant has put in some evidence tending to overthrow it.

SAME.—*Evidence.*—Evidence in support of the defence of insanity should be scrutinized with care.

SAME.—Direct evidence is not essential, but any fact may be inferred from sufficient circumstances in criminal as in civil cases.

SAME.—*Witness.—Expert.—Jury.*—The jury is not required by law to give greater weight to the testimony of medical experts than to other witnesses who state facts within their knowledge, but it is for the jury to judge of the weight which each shall receive.

From the Clay Circuit Court.

E. S. Holliday, *G. A. Byrd* and *S. W. Curtis*, for appellant.

F. T. Hord, Attorney General, *S. M. McGregor*, Prosecuting Attorney, *G. A. Knight* and *C. H. Knight*, for the State.

ELLIOTT, J.—The appellant was adjudged guilty of murder in the first degree and sentenced to imprisonment in the State prison for life, and from the judgment of conviction prosecutes this appeal.

The questions argued are such as are said to arise on the ruling denying a new trial, and, conceding but not directly deciding that they are properly presented by the record, we will discuss and decide them.

There was no error in instructing the jury that every man is presumed to be sane and to intend the natural and usual consequences of his own acts.

Our cases settle the rule that voluntary intoxication is no excuse for crime, and they are in harmony with the great current of authority. *Cluck* v. *State*, 40 Ind. 263; *Gillooley* v. *State*, 58 Ind. 182; *Fisher* v. *State*, 64 Ind. 435; *Colee* v. *State*, 75 Ind. 511.

It is true, as stated in one of the instructions given by the court, that ungovernable passion does not constitute insanity. It is the duty of one whose will power is not impaired by disease to govern and control his passions, and if he yields to passion and slays another, he must pay the penalty prescribed by law. *Guetig* v. *State*, 66 Ind. 94 (32 Am. R. 99).

The State is not in the first instance bound to introduce evidence to prove the sanity of the accused, for the presumption of mental soundness continues until some evidence has been offered by the defendant tending to overthrow it. *Guetig* v. *State*, *supra*. The statute providing that the accused shall set up the defence of insanity by special plea does not change the rule.

The court did not err in directing the jury that it was their duty to carefully scrutinize the evidence offered in support of the defence of insanity. The adjudicated cases all agree in holding that a careful scrutiny should always be given evidence offered to establish the defence of insanity in criminal

prosecutions. *Sawyer* v. *State*, 35 Ind. 80; *Guetig* v. *State*, *supra*.

A fact may be inferred from circumstances in criminal prosecutions as well as in civil cases. It is not necessary to prove a proposition of fact in any case by direct and positive evidence; it may always be inferred from circumstances.

Instructions are to be taken as a whole and not in detached parts, and if they correctly express the law when so taken they will be upheld. It is not enough to show that a clause or sentence standing by itself is incorrect, for, if it is correct when considered in connection with the language with which it is associated, the instruction will not be condemned.

Jurors are not bound to give more weight to the testimony of medical experts than to that of non-expert witnesses who state facts within their own knowledge. It is not for the court to pronounce as matter of law which of the two classes of witnesses shall receive the greater weight. That is a question for the jury. *People* v. *Montgomery*, 13 Abbott Pr. N. S. 207; *McGregor* v. *Armill*, 2 Iowa, 30; *Tatum* v. *Mohr*, 21 Ark. 349; *Chandler* v. *Barrett*, 21 La. Ann. 58; *State* v. *Bailey*, 4 La. Ann. 376; Rogers Exp. Test., section 37; *Van Valkenberg* v. *Van Valkenberg*, 90 Ind. 433, see p. 437; *Fulwider* v. *Ingels*, 87 Ind. 414; *Snyder* v. *State*, 70 Ind. 349. Giving to each class of testimony its due weight, the jury in the present case could not, as we read the evidence, have reached any other conclusion than that embodied in their verdict.

We have examined the important questions discussed, although we are strongly impressed that the counsel for the State are correct in affirming that the questions were not properly saved, and we feel clear that the judgment should be affirmed, and so adjudge.

Filed March 13, 1884.

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No. 11,126.

CONDEN v. MORNINGSTAR ET AL.

PRACTICE.—*Instructions.*—Where the evidence is not in the record, an instruction will be upheld by the Supreme Court, if in any conceivable state of evidence under the issues it might have been proper.

SAME.—*Exceptions.*—Exceptions to instructions must be taken either in the mode prescribed by section 535, R. S. 1881, or by bill of exceptions; and, if not so reserved, no question thereon can be made in the Supreme Court.

SAME.—*Evidence.*—The refusal to admit evidence will not be held to be error if the evidence could only have been proper upon the introduction of some other evidence, and none of the evidence is in the record. For illustration see opinion.

EXAMINATION OF WITNESS.—A question to a witness which assumes a fact not proved should not be allowed.

SAME.—*Witness.*—The refusal to allow a question to be put to a party's own witness, the trial court not having been informed of the evidence expected to be elicted, is not available error.

From the Morgan Circuit Court.

L. Ferguson, for appellant.

HAMMOND, J.—This was an action by the appellee Sarah C. Morningstar against the appellant and the appellee John C. Comer, sheriff, who declines to join in the appeal, to recover the possession of personal property. The issues were tried by a jury, and a verdict returned for the plaintiff. The appellant's motion for a new trial was overruled, an exception reserved, and judgment rendered upon the verdict. The overruling of the motion for a new trial is assigned for error. The consideration of the case will be confined to such points of alleged error as are discussed in the appellant's brief.

Complaint is made of instruction numbered 10, given by the court to the jury. There are two methods of taking an exception to an instruction. The first requires no bill of exceptions, but simply the writing on the margin, or at the close of each instruction, "refused, and excepted to," or "given, and excepted to," and signed by the judge and dated. Section 535, R. S. 1881. An exception to an instruction may also be

shown by a bill of exceptions. Section 626, R. S. 1881. The appellant, with respect to the charge complained of, pursued neither of these methods. An exception to the giving of the instruction was written at its close, but not signed by the judge; it was signed by the appellant's attorneys. While this would have been correct under the former code (section 325, R. S. 1876), it will be seen that section 535, *supra*, has changed the practice in this respect. An error in giving or refusing an instruction can not be considered by this court unless one of the statutory requirements in taking an exception has been complied with. 1 Works Prac., section 796. While it is unnecessary, it is not improper to say, that where, as in this case, the evidence is not in the record, a case can not be reversed on account of the giving of an instruction, unless it is so manifestly wrong as not to apply to any supposed case which might have been made by the evidence. *Drinkout* v. *Eagle Machine Works*, 90 Ind. 423. Tested by this rule, we could not hold the instruction complained of erroneous, even though the exception thereto had been properly taken.

The appellant also complains of the rejection of certain evidence offered by him at the trial. As the record contains none of the evidence, the exclusion of testimony is not available as error in this court, unless it affirmatively appears from the issues that it should have been admitted. Thus, in a plea of payment in a suit on a promissory note, the rejection of any competent evidence tending to prove such payment would be an error which might be considered by this court without bringing here any of the evidence that was introduced at the trial. But where the evidence rejected depends for its pertinency upon the introduction of other evidence tending to prove some fact, then the evidence relating to such fact must also be in the record, otherwise it would not affirmatively appear that there was any error in the exclusion of the offered testimony. *Johnson* v. *Wiley*, 74 Ind. 233; *Shorb* v. *Kinzie*, 80 Ind. 500; *Pavey* v. *Wintrode*, 87 Ind. 379.

The plaintiff claimed in her complaint that she was the

owner of the property in controversy; that a judgment had been rendered in favor of the appellant against Peter Morningstar and William H. Poore; and that an execution issued on said judgment had been wrongfully levied upon said property. The appellant answered by the general denial, and also specially to the effect that the plaintiff's only claim of title to the property was derived by a pretended sale by her husband, said Peter Morningstar, to said Poore, and by her pretended purchase from said Poore, and that these transfers were made to defraud creditors. She replied by the general denial. At the trial the appellant introduced Poore as a witness, and proposed to prove by him that during the pendency of the appellant's suit against Morningstar and Poore, in which the judgment referred to was obtained, said Morningstar made statements to the effect that he intended to delay the recovery of judgment in that action to give himself time to dispose of his property so that it could not be reached by execution. On the plaintiff's objection this evidence was not admitted. Now, it is plain, we think, that the appositeness of this evidence was dependent upon the fact whether other evidence was introduced tending to prove the appellant's special defence, namely, that the plaintiff's title to the property was claimed through a sale from her husband to Poore, and also by her purchase from the latter. There is nothing in the record, except the averment in a pleading which is denied by another pleading, showing that the plaintiff's husband ever owned the property in controversy. Unless there was some evidence tending to prove this fact, it is manifest that the husband's statements of a purpose to dispose of his property to defraud creditors was wholly irrelevant to the case. The burden rests upon a party appealing to this court to show affirmatively by the record that a ruling complained of was erroneous and prejudicial to his rights. In the absence of such showing we must presume in favor of the correctness of the ruling.

The appellant introduced, as a witness in his behalf, Peter

Morningstar, and asked him to state to the jury what his intent was in transferring the property in controversy to William H. Poore, and what his intent was in causing said Poore to assign said property to the plaintiff. The court sustained an objection to the question. In the absence of the evidence from the record, the ruling of the court may be upheld on the theory that it was not proved at the trial that the witness ever owned the property, or made or caused the transfers alluded to. Where a fact is not proved or admitted, a question to a witness which assumes its existence is erroneous, and an objection thereto is correctly sustained. It does not appear what the appellant proposed to prove by the witness in answer to the question. It may be that the witness would have stated that his intent was honest in the matters inquired about, and that he would have given such explanations of the transfers of the property as would have been consistent with the *bona fide* ownership thereof by the plaintiff. In such case the appellant could not complain at the refusal of the court to permit the question to be answered. The sustaining of an objection to a question asked by a party to his own witness is not available as error in this court, unless the record shows that the trial court was informed what was proposed to be proved by the answer to the question. *First Nat'l Bank* v. *Colter*, 61 Ind. 153; *Farman* v. *Lauman*, 73 Ind. 568.

We are unable to find any error in the record.

Judgment affirmed, at appellant's costs.

Filed March 13, 1884.

No. 9788.

MOORE ET AL. *v.* TRIMBLE ET AL.

FRAUDULENT CONVEYANCE.—*Complaint to Set Aside.—Judicial Sale.—Notice of Fraud to Purchaser.—Demurrer.*—In an action to set aside a conveyance of real estate on the ground of fraud, where the complaint

shows that the defendant's grantor derived his title through the medium of an intervening judicial sale, in good faith, for value and without notice of the alleged fraud, the complaint is bad on demurrer, even though it shows that the conveyance of the defendant was without any valuable consideration.

From the Shelby Circuit Court.

N. B. Berryman, *R. W. Wiles*, *B. F. Love* and *H. C. Morrison*, for appellants.

G. M. Wright, for appellees.

HOWK, C. J.—The only questions for decision in this case arise upon the rulings of the trial court in sustaining appellees' demurrers to the appellants' complaint, which rulings are assigned here as errors.

In the complaint of the appellants, in form a petition, it was alleged, among other things, that on June 21st, 1870, one John Boran, being then the owner of the undivided one-half of four and one-half acres of land, particularly described, in Shelby county, executed a mortgage to John Trimble upon his one-half interest in such real estate, to secure the payment of his note for $454.29, due twelve months after date, with ten per cent. interest, which mortgage was, on the same day, recorded in the mortgage record of the recorder's office of Shelby county; that afterwards, in April, 1873, John Trimble died intestate, at said county, leaving as his only heirs at law the appellants, Phœbe Moore, Sarah Patterson and Elmira Cole, and the appellees, John, Levi, Elizabeth and Rebecca Trimble; that on September 30th, 1873, before the appointment of any administrator of the estate of John Trimble, deceased, his said heirs filed a complaint in the court below, for the foreclosure of said mortgage, making defendants thereto John Boran and others, as the only heirs at law of Jesse F. Boran, deceased; that such proceedings were thereon had that in March, 1874, a decree of foreclosure was rendered, and for the sale of the real estate mortgaged, to satisfy the sum of $635.95 then due, and costs therein; that on October 20th, 1874, a copy of such decree was issued to the sheriff of Shelby

county, who, on November 14th, 1874, sold such real estate to Nathan Moore, as administrator of the estate of John Trimble, deceased, for $702.60, and executed to him a certificate of such purchase; that the said Moore had then been duly appointed administrator of said estate, and had purchased the real estate from the sheriff for the use and benefit of the heirs, and had paid therefor, as such administrator, receipting to the sheriff for the amount of said decree, and paying him the costs of such sale out of the moneys of the estate; that on November 26th, 1875, the sheriff executed to said Moore, as such administrator, for the benefit of said estate, a deed of such real estate.

And the appellants further alleged that on November 15th, 1871, one James W. Crook recovered a judgment in said court against one John Howry and Jesse F. Boran for $181.96, and costs, upon which judgment execution issued to the sheriff of the county, who, on June 15th, 1872, sold the undivided one-half interest of Jesse F. Boran to said James W. Crook, and issued to him a certificate of purchase therefor; that afterwards, on June 17th, 1873, the sheriff executed to said Crook a deed of said real estate, which deed was duly recorded on July 8th, 1873, in the recorder's office of such county; that afterwards, on January 23d, 1874, said Crook conveyed such real estate to Leander Griffin by deed, duly recorded on February 6th, 1875, in such recorder's office; that on February 18th, 1874, Leander Griffin filed his complaint for partition against Amanda Kemp, then the owner of the other undivided one-half of said real estate; that such proceedings were had thereon that, on January 7th, 1875, the court ordered a sale of the whole of such real estate at private sale; that on April 1st, 1875, the commissioner appointed by the court in such partition suit sold and by deed conveyed such real estate to Hanly Wray for $2,000; and that afterwards the said Hanly Wray, by his deed, without any valuable consideration, conveyed such real estate to his daughter, Amanda Kemp.

The appellants further averred that said Leander Griffin

was the attorney for the heirs of John Trimble, deceased, in their suit for foreclosure and in obtaining their decree; that said Griffin concealed from said heirs the fact that he had obtained his said deed from said Crook; that after the decree of foreclosure was rendered, the said Moore, as such administrator, under the advice of said Griffin, caused a copy of such decree to be issued for the sale of said real estate to satisfy said decree; that in the matter of such decree, and in the sale and purchase of such real estate, the said Griffin, who was an attorney at law, was the attorney of said Moore, as such administrator; that at the time said Moore, as administrator, so purchased said real estate at sheriff's sale, he and the Trimble heirs were wholly ignorant of the fact that said deed had been executed to said Griffin, or that he, Griffin, had any right, title or interest in or to such real estate, or any part thereof, and of the fact that said Crook had purchased such real estate at sheriff's sale, or in any other manner; that the said Griffin, with the fraudulent intent to cheat and deceive the Trimble heirs and said Moore, as such administrator, before and at the time said Moore purchased said real estate, and with the intent to induce said Moore, as administrator, to purchase the same and to bid thereon the amount of said decree, interest and costs, and to receipt to the sheriff for such amount as the consideration of such purchase, falsely and fraudulently represented to said Moore that he, Griffin, knew of no one who had any title or interest whatsoever in said real estate, except the heirs at law of said Boran, who had been made defendants in said foreclosure suit, and that if said Moore should buy the same at the sheriff's sale upon said decree, his title thereto would be good, and that no other party or parties, except the defendants in such foreclosure suit, had any claim, title or interest in said real estate, or any part thereof; that said Moore, through such advice, representations and persuasions of said Griffin, was induced to and did purchase said real estate at such sheriff's sale, for the price aforesaid, and as a part of his bid paid the costs, and receipted to the sheriff,

as such administrator, for the principal and interest of said decree; that the said Griffin, at the times he made such representations to said Moore, well knew them to be false, and that he was then holding the deed so executed to him by said Crook; that the interest claimed by said Griffin in said partition suit, and therein adjudged to belong to him, was the same interest in said real estate which he claimed under his conveyance from said Crook; and that at the time said Wray purchased said real estate from the commissioner, under the partition sale, he, Wray, had full notice and knowledge that the said Moore had, before that time, purchased such real estate at the sheriff's sale under said decree, in said foreclosure suit, and held a certificate of purchase therefor. Wherefore, etc.

Neither Griffin nor Wray were made defendants to this action. The controlling question in the case, and the only question we are required to decide, is this: Does the appellants' complaint state facts sufficient to constitute a cause of action against the appellee Amanda Kemp? If this question must be answered in the negative, and we think it must, then it is clear that the court did not err in sustaining the demurrer of the other appellees to the appellants' complaint; for, unless the appellants are entitled to have the deeds, under which Amanda Kemp claims the entire real estate, set aside as fraudulent and void as to them, and their alleged title quieted as against her, they are in no condition to demand the partition of such real estate as between themselves and any of the appellees, and this was all the relief demanded as against the appellees, other than the Kemps.

We have given the appellants the benefit of a full summary of the allegations of their complaint. It will be seen therefrom that they charge Griffin with false and fraudulent representations, but he is not a party to the suit; and it is difficult, if not impossible, for us to see how or in what manner the charges against Griffin can impeach or invalidate the title of the appellee Amanda Kemp. If it were conceded that the

alleged fraudulent conduct of Griffin would have invalidated his title to the real estate, if he had continued to hold it, in a controversy between him and the appellants, still the allegations of the complaint are wholly insufficient to affect the title of Wray, or of his grantee Amanda Kemp. This would be so, even if Wray had been the grantee of the real estate, in a direct conveyance from Griffin, and it is clearly so when it appears, as it does in this case, that the grantee derives his title through the medium of an intervening judicial sale. It is nowhere averred in the complaint that at the time of the commissioner's sale of the real estate, under the judgment of the court in the partition suit, or at any time, the purchaser, Wray, had notice or knowledge of the alleged fraudulent conduct of Griffin in his dealings with the appellants, in relation to such real estate. In the absence of some showing to the contrary, we would be bound to assume what we think the complaint shows, that, at the commissioner's sale of the real estate, Wray was the purchaser in good faith, for value and without notice of the alleged fraud of Griffin. In such a case we are of opinion that the title acquired by Wray, by such purchase of the real estate, was in no manner affected by the alleged fraud of Griffin, of which the appellants complain. *Brown* v. *Rawlings*, 72 Ind. 505; *Sherman* v. *Hogland*, 73 Ind. 472; *Brookville Nat'l Bank* v. *Kimble*, 76 Ind. 195.

Wray having acquired a title to the real estate, not affected by the alleged fraudulent conduct of Griffin, could, and doubtless did, convey the same title, similarly unaffected by Griffin's fraud, to his grantee and daughter Amanda Kemp, even though his conveyance to her was "without any valuable consideration."

We find no error in the record.

The judgment is affirmed, with costs.

Filed March 13, 1884.

No. 11,219.

94 159
145 509

HARVEY ET AL. *v.* THE STATE, EX REL. TOWN OF MONTICELLO.

PLEADING.—*Plea in Abatement and in Bar.—Judgment.*—A judgment, if it can be successfully pleaded at all, can not be pleaded in abatement, but only in bar.

TOWN TREASURER.—*Suit on Bond.—Judgment.—Pleading.—Res Adjudicata.*—In a suit upon the bond of a town treasurer for failure to pay the moneys of the town to his successor, an answer in bar that third parties had recovered a judgment against the town upon bonds issued by the town is bad.

PRINCIPAL AND SURETY.—*Official Bond.—Answer by Sureties.—Discharge.—New Bond.*—In a suit upon an official bond an answer by sureties, that the sureties on a former bond had, upon proper application, in term obtained an order from a judge *pro tem.* discharging them, which, however, was never entered of record, and thereupon the bond sued on was executed, is bad.

SAME.—*Evidence.*—Conversations between the principal and sureties prior to the approval of the bond, and without the knowledge of the officers charged with the acceptance, are not admissible in evidence on behalf of the sureties.

SAME.—*Breach.—Town Treasurer.*—The use by a town treasurer of the funds of the town is not a breach of the condition of his bond; there is no breach until he fails to pay or account as the law requires.

From the Carroll Circuit Court.

A. W. Reynolds, E. B. Sellers, J. A. Stein, M. M. Sill, T. F. Palmer and *J. H. Wallace,* for appellants.

W. E. Uhl and *D. Turpie,* for appellee.

ELLIOTT, J.—The bond on which the action is founded was executed by Harvey as principal, and the other appellants as sureties, to secure the faithful discharge of the duties of the office of treasurer of the town of Monticello to which Harvey had been elected. The town was the relator and charged that Harvey had at the time his term of office expired a large sum of money in his hands belonging to the town, which he refused to pay over to his successor.

The sureties pleaded, both in abatement of the action and in bar, a judgment of the Lake Circuit Court rendered against

the town of Monticello and others, in a suit instituted by holders of bonds issued by the town. It is quite clear that it was not proper to plead the judgment as matter in abatement, for, if the judgment pleaded constituted any defence at all, it was in bar, and not in abatement. A judgment is properly pleaded in bar, for, if binding upon the parties, it does much more than abate the pending action; it puts an end to the controversy.

The judgment is not a bar because it does not appear to have been rendered upon the cause of action here involved, nor does it appear to have been rendered in an action between the same parties as those to the present action. The judgment pleaded was in favor of the creditors of the relator, and surely the treasurer of the relator can not take any benefit from such a judgment. If he had paid the money awarded the creditors, a very different question would have been presented, but as the question is now presented it is entirely free from difficulty, for it is plain that a town officer can not take advantage of a judgment in favor of a creditor of the town and make it available as an excuse for not paying over to his successor money belonging to the town.

The third paragraph of the answer of the sureties admits that Harvey was elected treasurer of the town of Monticello, and alleges that he executed his official bond with certain named persons as sureties; that afterwards at the June term, 1880, of the White Circuit Court, William W. McCulloch, W. J. Huff and W. L. Bushnell, sureties, petitioned the judge of that court in writing to be released from the bond; that Harvey entered an appearance to the petition, and Judson Applegate, Esq., judge *pro tempore*, made an order releasing the petitioning sureties; that the order was merely marked "Filed," and that no other record of the proceedings was ever made. It is further alleged that the bond sued on was executed subsequent to the order made by Mr. Applegate, and that this bond was ineffective because the original bond was still in force.

The order made by the judge *pro tempore* of the White Circuit Court, releasing the petitioning sureties, was not void. It was made at a regular term of court, by a judge appointed to hold term, and is, therefore, valid. The failure to make the proper record did not render the order ineffective. It had fully accomplished its purpose before the appellants executed the bond sued on. They recognized this fact by executing this bond.

We do not regard it as very important whether the order of the White Circuit Court was valid or invalid, because it was fully acquiesced in and executed by the parties interested before these appellants became sureties on the present bond. We suppose it to be perfectly clear that the original bond might, by agreement of the parties, have been superseded by a new one, and that when this took place the sureties on the second bond could not be heard to aver that the original bond was still in force. There was no reason why a new bond might not be substituted for the original one, and when it did take the place of the old one, the latter ceased to be binding so far as future official acts were concerned. But in the present case the judge was at least an officer *de facto*, and his acts can not be collaterally impeached by persons who have acquiesced in them without objection. *Oppenheim* v. *Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Gumberts* v. *Adams Express Co.*, 28 Ind. 181; *Creighton* v. *Piper*, 14 Ind. 182; *Blackman* v. *State*, 12 Ind. 556; *Steinback* v. *State, ex rel.*, 38 Ind. 483; *Feaster* v. *Woodfill*, 23 Ind. 493; *Case* v. *State*, 5 Ind. 1. We have, therefore, the order of a judge who had at least the authority of a judge *de facto*, and the agreement of the parties recognizing and carrying into effect that order, and the plainest principles of justice forbid the appellants from now averring that their bond is without force.

Conversations between a principal and his sureties on an official bond are not competent evidence. The obligee of such a bond is not bound by what occurs between the princi-

pal and sureties, unless brought to the knowledge of the officers whose duty it is to accept such a bond prior to its delivery. The trial court did right in excluding the evidence of the conversations between Harvey and his sureties. *Whitcomb* v. *Miller*, 90 Ind. 384.

A public officer is not a mere bailee of the public funds entrusted to him by the law, and is not in default until he has failed to pay some claim which it was his duty to pay, or has failed to account for the funds in his hands at the time required by law. *Rock* v. *Stinger*, 36 Ind. 346; *Shelton* v. *State, ex rel.*, 53 Ind. 331 (21 Am. R. 197); *Linville* v. *Leininger*, 72 Ind. 491; *Brown* v. *State, ex rel.*, 78 Ind. 239; *Bocard* v. *State, ex rel.*, 79 Ind. 270; *State* v. *Julian*, 93 Ind. 292. The cases cited establish the principle that use of public money does not constitute a breach of the bond, and that the breach occurs only when the officer fails to account for the money as required by law. In this case the evidence very fully and clearly shows that there was no default on the part of Harvey until after the execution of the bond sued on in this action, and it is clear, upon principle and authority, that the sureties on the bond in force when the default occurred are liable. *Brown* v. *State, ex rel., supra; Bocard, etc.*, v. *State, ex rel., supra.*

The evidence shows the amount paid to Harvey, and it devolved upon him and his sureties to show that he had accounted for it. The evidence, instead of showing that he did account for it, shows that he failed to pay it over to his successor, or to account for it in any manner. The breach, therefore, is clearly established, and appears to have been committed after the execution of the bond in suit.

We think that there is an error in the assessment of damages, and that the amount is $73 more than should have been assessed.

If the appellee will remit within thirty days the sum of $73 the judgment will be affirmed, at its costs. If remittitur is not entered within that time, the judgment will stand reversed, at the costs of appellee.

Filed March 12, 1884.

No. 10,967.

GLASSCOCK v. GLASSCOCK.

DIVORCE.—*Pleading.—Evidence.—Decree.*—Under section 1040, R. S. 1881, the defendant in a divorce suit may not only file an answer, but also a cross petition, and the court may decree the divorce to the defendant upon evidence introduced by the plaintiff only.

SAME.—*Alimony.*—Where such cross petition is filed by the wife, asking a divorce and for alimony, the burden of proof as to the alimony is upon her, and if no proof be introduced bearing on that question, she can not complain that no alimony is awarded her.

From the Warren Circuit Court.

M. Milford, for appellant.

C. V. McAdams, for appellee.

COLERICK, C.—This was an action brought by the appellee to obtain a divorce from the appellant on the ground of abandonment. The appellant answered the petition by a general denial and filed a cross petition therein, alleging that the appellee abandoned her, and had failed to make reasonable provisions for his family, for a period of more than two years, and praying a divorce from him and alimony. The case was tried by the court and resulted in the rendition of a decree granting a divorce to the appellant on her cross petition. No alimony was allowed by the court. A motion for a new trial was made by the appellant. The reasons assigned in support of the motion were, that the finding was not sustained by sufficient evidence and was contrary to law. The motion was overruled, and this ruling is the only error assigned for the reversal of the judgment. The only evidence rendered at the trial was introduced by the appellee. The evidence is set forth in the record, and tends to sustain the finding. The appellant insists that the court possessed no power to grant her a divorce upon evidence solely introduced by the appellee, and that the evidence, so rendered, was insufficient to authorize a decree in her favor. If the court erred, as claimed by the appellant, it was an error in her favor, and

therefore she can not complain, as it is well settled by the decisions of this court that a party can not complain of an error which operated in his favor. Buskirk Pr. 119, and the cases there cited.

The statute provides that "In addition to an answer, the defendant may file a cross petition for a divorce; and when filed, the court shall decree the divorce to the party legally entitled thereto." R. S. 1881, section 1040. Under this provision the trial court considers all the evidence given in the cause regardless of the party in whose favor it was introduced, and determines therefrom which one, if either, of the parties is entitled to the divorce, and renders a decree accordingly. It may happen, as in this case, that the evidence introduced in support of the petition may be insufficient to authorize the granting of a divorce thereon, and yet, of itself, be amply sufficient to sustain the cross petition. In such case, we think, the court should apply the evidence, so rendered, to the cross petition, and consider it, with reference to the cross petition, the same as if it had been introduced in support thereof. If the appellant did not desire a decree of divorce, as prayed for by her, she had the right to dismiss her cross petition before the decision of the court was announced. This she did not do, but allowed the case, with her cross petition still pending, to be finally submitted to the court for determination upon the evidence introduced by the appellee, and the court properly granted the divorce to her, because, according to the facts established by the evidence, she was "the party legally entitled thereto."

The appellant contends that the court erred in not rendering a decree in her favor for alimony, and asserts that it is the imperative duty of the trial court in every divorce case to award alimony. To support this assertion she cites the following provision of the statute: "The court shall make such decree for alimony, in all cases contemplated by this act, as the circumstances of the case shall render just and proper." R. S. 1881, section 1045. It is evident that the word "shall,"

as used in the statute, merely relates to the amount of alimony that may be allowed in cases where it is proper to allow alimony. The statute does not mean, as contended by the appellant, that the court shall, in every action for divorce, allow alimony. The adjusting of alimony is not yet controlled by definite rules. The determination of each case must depend upon its own circumstances. *Hedrick* v. *Hedrick*, 28 Ind. 291. In the case under consideration there was no evidence showing what property, if any, the parties, or either of them owned, nor the husband's condition in life, health, age, occupation or ability to earn money. In fact, no evidence was introduced or offered proving or tending to prove any fact or circumstance that would have been proper or necessary for the court to consider in determining the question of alimony or fixing its amount. The burden of such proof rested upon the appellant, and in the absence of such proof it was impossible for the court to render a decree for alimony, as no data were furnished by which an amount that would have been "just and proper" under the circumstances of the case could be fixed.

There being no error in the record the judgment must be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellee.

Filed March 14, 1884.

No. 10,615.

94 165
135 148
94 165
150 166

SHORB ET AL. *v.* BRUBAKER ET AL.

WILL.—*Contest of.—Instructions.—Evidence.—Delusion.—Admission of Legatee.*—Suit to contest a will on the ground that the testator was of unsound mind.

Held, that evidence that the testator had expressed the opinion that some of his children contestants had mistreated him, stating no fact, and an opinion expressed by such children, as witnesses, that they had not mistreated him, was too intangible to justify an instruction that if the

testator was influenced in framing his will by such belief, and that it was a delusion, the fact would justify a verdict for the contestants.

Held, also, that an admission by one of several contestees that the testator was of unsound mind was not admissible in evidence.

Held, also, that evidence that a tract of land devised to one of the contestees was purchased with money of the testator's first wife, and the title taken by mistake in his own name, was not admissible.

From the Kosciusko Circuit Court.

C. Clemans, for appellants.

J. S. Collins, for appellees.

HAMMOND, J.—The appellants, who were daughters of Jacob Brubaker, deceased, filed their complaint in the Whitley Circuit Court against the other children, the widow and the executor of the decedent, to contest the validity of his will. The venue was changed to the court below. The will made provision for the widow and all the testator's children, including the appellants, but the small bequests made to them were probably the cause of their dissatisfaction. The complaint alleged that the decedent was of unsound mind at the time of executing the will, and that it was unduly executed. An issue, made by the general denial, was tried by a jury, resulting in a verdict for the appellees. The appellants' motion for a new trial, filed at the proper time, was overruled; an exception was taken to the ruling, and judgment rendered on the verdict. The overruling of this motion is assigned for error.

The third, sixth and tenth causes for a new trial are waived in the appellants' brief. The first and second causes set out in the motion for a new trial were, that the verdict was contrary to the evidence and the law. The evidence, we think, fully supports the verdict, both as to the decedent's testamentary capacity, and as to the due execution of the will.

The fourth cause for a new trial is not discussed in the appellants' brief.

The fifth cause for a new trial was the refusal of the court to give to the jury the following instruction asked by the ap-

pellants: "If, from all the evidence and the facts given in the cause, you should find that Jacob Brubaker, the decedent, imagined and believed that his two daughters, the plaintiffs Lavina Short and Susan Phillips, or either of them, had misused and mistreated said Brubaker, the decedent, when in truth and fact such was not the case, and it was merely a delusion in the mind of the testator; and if you further find that such delusion influenced him, the testator, in the disposition of his property, and in the making of his will, you will then be justified in finding that the will in controversy was not the will of the testator."

The evidence upon which this instruction was asked did not relate to any fact. Its application was simply to an opinion given by the testator at the time of making his will, that the appellants had misused and mistreated him, and to a contrary opinion expressed by the appellants while testifying that they had never misused or mistreated him. Evidence of this kind is too intangible for judicial cognizance in determining the validity of a will. An act, which in the opinion of one person might be regarded as misuse or mistreatment, might, in the judgment of another, be esteemed as harmless, or, indeed, as a token of affection or friendship. Had the testator given any fact which, if true, would have been a flagrant breach of filial duty upon the part of appellants, and had it been shown that this fact had no existence except in the imagination of the testator, it would have been right in that case to charge the jury that such evidence was proper for their consideration in determining the testator's mental capacity. But upon the evidence before the jury, the instruction, if given, would have tended to confuse and mislead. We think it was correctly refused.

The seventh, eighth and ninth causes for a new trial related to the refusal of the court to admit certain evidence offered by the appellants. It was proposed to prove that one of the legatees, the testator's widow, who was his second wife, made admissions, just before his death, to the effect that he was of

unsound mind when the will was executed. The attack of the appellants was not confined to any particular part, but was against the entire will. In such case the law is settled that the admissions of one legatee can not be received as evidence against the validity of the will. *Hayes* v. *Burkam*, 67 Ind. 359; *Ryman* v. *Crawford*, 86 Ind. 262.

The appellants also proposed to introduce evidence tending to prove that forty acres of land, devised to one of the appellees, was purchased with money of the testator's first wife, and that the deed therefor was taken by mistake in his name. This evidence was not pertinent to any issue in the case, and was rightly excluded.

The eleventh and last cause for a new trial is not discussed in appellants' brief.

We find no error committed by the trial court in overruling the appellants' motion for a new trial.

Judgment affirmed, at appellants' costs.

Filed March 14, 1884.

No. 9987.

ARBUCKLE *v.* BIEDERMAN ET AL.

PRACTICE.—*Motion for New Trial.*—A motion for a new trial, assigning for cause that the court "admitted improper evidence" and excluded "competent evidence, as shown by bill of exceptions No. 2, now exhibited to the court," is too indefinite to present any question where the bill of exceptions is not filed until afterwards.

SAME.—*Bill of Exceptions.—Instructions.*—Under the code of 1852 no question as to instructions could be saved by a bill of exceptions filed at a subsequent term unless time was given to file the bill at the term at which the cause was tried.

SAME.—*Brief.—Waiver.*—A brief which merely states a question, but fails to so discuss it as to show any reason for questioning the action of the court below, is a waiver of the question.

FRAUD.—*False Representations.—Lease of Coal Mine.—Pleading.*—A complaint by the lessee against the lessor of a coal mine, which could not be examined, showing that by representations of material matters known

by the lessor to be false, he induced the plaintiff to take the lease which was of less value than if the statements had been true, specifying the particulars, contains a good cause of action.

From the Vigo Circuit Court.

I. N. Pierce, T. W. Harper, C. F. McNutt, B. E. Rhoads, C. Byfield and *L. Howland*, for appellant.

W. Eggleston, for appellees.

BICKNELL, C. C.—This was a suit by the appellees against the appellant to recover damages for false representations and fraud in reference to a coal mine which the appellees were seeking to lease, and, relying on such representations, did lease from the appellant on the second day of October, 1879.

The suit was commenced in March, 1880. The defendant filed an answer in three paragraphs, of which the first was a general denial and the second and third were counter-claims. The plaintiffs answered the counter-claims in two paragraphs, to wit, the general denial, and a special answer, to which the defendant replied by a general denial. The issues were tried by a jury at the September term of the court, 1880. There was a verdict for the plaintiffs for $2,500. A motion by the defendant for a new trial was made at this term, and the cause was continued.

In February term, 1881, to wit, on March 25th, 1881, the defendant filed his bill of exceptions No. 1, containing the instructions and exceptions thereto, and he also filed his bill of exceptions No. 2, containing the evidence and the exceptions in relation thereto, and the motion for a new trial was then overruled. The defendant at the time excepted to the ruling on the motion for a new trial, and filed his bill of exceptions No. 3, containing certain affidavits in support of his fifth reason for a new trial, together with the exception to the ruling on the motion for a new trial. Judgment was rendered upon the verdict on the 29th day of March, 1881, of February term.

The errors assigned are:

1. The complaint does not state facts sufficient to constitute a cause of action.

2. Error in overruling the demurrer to the complaint.

3. Error in overruling the motion for a new trial.

The motion for a new trial, made at the September term, 1880, was supported by the following reasons then filed:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the law.

3. The damages are excessive.

4. Error of the court on the trial excepted to at the proper time, to wit:

a. Admitting improper and incompetent evidence offered by the plaintiffs as shown by bill of exceptions No. 2, now exhibited herewith to the court as a part hereof.

b. Excluding proper and competent evidence offered at the proper time by the defendant as shown by bill of exceptions No. 2, filed herewith as a part hereof, exhibited to the court now here.

c. In giving instructions asked by plaintiffs and numbered 1, 2, 3, 4, 5 and 6, and in giving each of said instructions, and excepted to as shown in bill of exceptions No. 1, filed herewith as a part hereof.

d. In refusing to give instructions asked by the defendant at the proper time, and numbered 3, 4, 6, 7, 10 and 12, as shown and set forth in bill of exceptions No. 1, filed herewith as a part hereof.

The foregoing were all the reasons for a trial filed at September term, 1880, but after the continuance of the cause, and before the February term, 1881, to wit, on January 6th, 1881, the following was added to the causes for a new trial, without any leave of court or consent of parties:

5. Because of newly discovered evidence material for the defendant, and which evidence was discovered by the defendant since the former trial, and which is set forth in the affidavits of divers persons, which affidavits are filed herewith as a part hereof, and this reason is now, on this 6th day of

January, 1881, and pending this motion, added to the reasons heretofore filed.

Of the original reasons for a new trial the appellant, in his brief, discusses only the admission and exclusion of certain testimony, and the refusal to give certain instructions asked for by the defendant. The other original reasons are, therefore, waived.

The original reasons for a new trial, so far as they relate to the admission or exclusion of testimony, are not sufficiently specific to present any question to this court.

The names of the witnesses are not given; the testimony is not stated. *Sherlock* v. *Alling*, 44 Ind. 184. The statement is that the court admitted improper evidence and excluded proper evidence, as shown by bill of exceptions No. 2, herewith filed.

In *Waybright* v. *State*, 56 Ind. 122, this court said: "To refer in this manner to evidence in a bill of exceptions or other paper, without distinguishing it from other evidence in the same bill of exceptions or paper, is insufficient, as we have often decided." Besides, the motion for a new trial was filed at September term, 1880, and bill of exceptions No. 2 was not filed until March 25th, 1881, at February term, 1881. There can be no valid reference, in reasons for a new trial, to a bill of exceptions not in existence when such reasons are filed. *McCammack* v. *McCammack*, 86 Ind. 387; *Sutherland* v. *Hankins*, 56 Ind. 343.

As to the alleged error in the refusal of the instructions, the cause was tried at the September term, 1880, but no exception was then saved, nor was any time then allowed for filing the bill of exceptions. At a subsequent February term of the court in 1881, the motion for a new trial was overruled and bill of exceptions No. 1, purporting to contain the instructions, was then filed. Under the code of 1852, which was then in force, such a bill of exceptions was not available for the purpose of saving any exceptions taken at the prior term of the court when the trial was had. *Supreme Lodge, etc.*, v. *Johnson*, 78 Ind. 110; *Heaton* v. *White*, 85 Ind. 376. And

the exceptions to the instructions were not saved in the other mode prescribed by sections 324 and 325, code of 1852, because it is not shown that the instructions were filed as required by said section 325. *Supreme Lodge, etc.*, v. *Johnson, supra.* Therefore no question is presented in reference to the refusal of instructions.

As to the newly discovered evidence, there is no discussion in the brief of the appellant of the ruling of the court below.

The statement in the brief is as follows:

"The court erred in overruling the motion for a new trial for the fifth cause, newly discovered evidence. T. p. 25, l. 25. For affidavits supporting the cause see T. p. 38, l. 17, and then to page 48, l. 15. We insist that the affidavits of E. A. Boyer and T. H. Riddle are of themselves sufficient to justify the court in granting appellant a new trial."

This is substantially a mere repetition of a part of the assignment of errors with reference to certain lines of the transcript. In *Parker* v. *Hastings*, 12 Ind. 654, this court said: "In Indiana, a brief, in addition to the statement of the case, * should contain a summary of the points or questions involved, with a citation of authorities, if authorities are relied on, and an argument based upon both, which should be characterized by perspicuity and conciseness; though, says Bouvier, 'when the argument is pertinent and weighty, it can not be too extended.' * * A mere copy of a part of the assignment of errors can scarcely be dignified with the name." See, also, *Deford* v. *Urbain*, 42 Ind. 476; *Gardner* v. *Stover*, 43 Ind. 356. In the case last cited the court said: "It" (the brief) "should at least, purport to furnish the court some information. * An attempt should be made to show why the judgment of the court below should be reversed or affirmed." In the brief in the case at bar there is no discussion of the question as to the newly discovered evidence; the statement is substantially, that the court erred and the affidavits will show it. This is not a discussion of the points involved, and the case, as to the newly discovered evidence, comes

fairly within the rule that causes for a new trial not discussed in the appellant's brief will not be considered by this court. *Stockton* v. *Lockwood*, 82 Ind. 158; *Powers* v. *State*, 87 Ind. 144; *Millikan* v. *State, ex rel.*, 70 Ind. 283.

The first and second assignments of error may be considered together. They present the question as to the sufficiency of the complaint.

The complaint states that the plaintiffs leased from defendant a certain coal mine for forty years and were to pay so much for the royalty; that they knew nothing about the mine or the coal that had been taken therefrom; that it was filled with water and could not be inspected; that defendant had last worked it and knew its condition; that in order to induce plaintiffs to take said lease, the defendant falsely and fraudulently represented to them that only three or four acres of the mine had been worked out, and that only four acres of the mine were covered with water which would have to be removed, and that the mine was in proper order for working; that the defendant also made other false representations as to the drainage of the mine and the quantity of coal near the shaft, and as to the condition of the shaft; that the plaintiffs relied on these representations, believing them to be true, and therefore took the lease; that the representations were all false and were known to be false by defendant when he made them; that instead of four acres, twenty-five acres had been mined, as defendant well knew, and that instead of having to take the water from four acres, which could have been done for $400, they had to take the water from twenty-five acres before they could examine and work the mine, to do which cost $2,500 and four months' labor, whereby they were prevented from working the mine for three months at the most profitable season of the year, to their further damage $500; that the shaft was decayed and unfit to use, and that if the said false representations had been true, the lease would have been worth to plaintiffs $8,500, but as the facts were it was not worth anything.

These representations were not mere statements as to value; they were representations of material existing facts upon which the plaintiffs had a right to rely. The complaint avers that they were false and known to be false, and were made in order to induce the plaintiffs to take the lease, and were relied on by the plaintiffs, who had no opportunity to examine for themselves. The complaint, therefore, contained a good cause of action. *Burt* v. *Bowles*, 69 Ind. 1; *Jenkins* v. *Long*, 19 Ind. 28.

There is no available error in the record; the judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby affirmed, at the costs of the appellant.

Filed Dec. 19, 1883. Petition for a rehearing overruled March 14, 1884.

No. 9964.

THE STATE, EX REL. JONES, *v.* CLOUD ET AL.

DECEDENTS' ESTATES.—*Suit on Administrator's Bond.—Pleading.—Nominal Damages.—Supreme Court.*—Complaint on the general bond of an administrator, averring the receipt of $2,000 personal assets, and the sale of real estate, and for breach: 1. Failure to pay money into court as ordered upon removal; 2. Conversion of money of the estate to her own use; 3. Waste in the payment in full of claims not preferred, the estate being insolvent; 4. The wrongful payment of a mortgage debt secured on land sold by her subject to the mortgage; 5. Allowance of unjust claims specified. Answer, that the administrator duly administered the personal estate.

Held, that the answer was good on demurrer except as to nominal damages, and, therefore, overruling the demurrer was not available error.

Held, also, that the fifth breach, if good, which is doubted, would only justify the recovery of a nominal sum.

Held, also, that under the complaint nominal damages only could be given, and for this only the Supreme Court will not award a new trial to the plaintiff.

From the Ohio Circuit Court.

J. B. Coles, for appellant.

A. C. Downey, for appellees.

ELLIOTT, J.—The complaint of the relator shows that he is the successor of Elizabeth Cloud, who had been the administratrix of the estate of Reynolds H. Campbell, deceased; that Mrs. Cloud was, by order of court, removed from the trust, and that she failed to discharge the duties of her trust in these particulars:

"1st. That she has failed to pay the sum of $1,200, the money belonging to the estate in her hands, into court, according to the order of the Ohio Circuit Court, in which court the settlement of the estate was and is pending, and has further failed to pay said sum or any sum due from her as such administratrix of the said estate to the relator.

"2d. That she converted the money in her hands belonging to the said estate to her own use in the sum of $1,500.

"3d. That she has wasted said estate by paying, without the order of court, general and unpreferred debts of said estate in full, and the said estate being insolvent, whereby said estate has been wasted and damaged in the sum of $1,000.

"4th. She has wasted said estate by paying David Huffard the sum of $1,034, when said debt was secured by a mortgage on real estate of the decedent, which real estate was sold by said administratrix by order of court subject to said mortgage, whereby said mortgage debt had ceased to be any part of the just indebtedness of said estate, thereby damaging the estate in the sum of $1,500.

"5th. She has wrongfully admitted improper and unjust claims against the estate of the said decedent, viz., the claim of Samuel Campbell for the sum of $892, thereby wasting and damaging the estate in the sum of $1,200."

By reason of these alleged breaches of duty recovery is sought on her general bond as administratrix.

The appellees alleged, in the second paragraph of their answer, that Elizabeth Cloud "fully administered all and singu-

lar the personal estate of the deceased, which came to her knowledge and possession as administratrix."

It is urged that this answer does not meet the charge that the administratrix improperly allowed the unjust claim of Samuel Campbell, and therefore does not meet all of the allegations of the complaint.

It is a familiar rule that an answer professing to answer an entire complaint must do so, or it will go down before a demurrer. This rule is to be understood, however, as meaning that all of the material parts of the complaint shall be answered, and not as meaning that the bad or immaterial parts must be answered. *Worley* v. *Moore*, 77 Ind. 567. It is at least very doubtful whether the fifth breach is well assigned, as there is nothing showing that the administratrix acted in bad faith or knowingly did wrong. For aught that appears she may have acted in perfect good faith, and with proper care and diligence, in admitting Campbell's claim. But, without deciding whether it shows a right to any action, we do decide that, at the utmost, it shows no more than a right to nominal damages. It has long been the rule of this court that a reversal will not be adjudged where the ruling complained of does no more than affect the right to recover such damages as are merely nominal. The rule applies here; for, upon this theory, all that was left unanswered is the breach which, if good at all, was not good for the recovery of more than a nominal sum.

It also urged that the answer is bad, because it does not aver that the estate was administered before the action was instituted. We think that it does do this, for the complaint alleges that the removal of the administratrix took place before the suit was brought, and if it be true, as averred, that the estate was duly administered, then it must also be true that the administration preceded the filing of the complaint. It may be that the plea should have been more certain in this respect, but the remedy for uncertainty is by motion, and not demurrer.

It is also insisted that the answer is not a good one in an action on the bond of an administrator, and that it is appropriate only in actions against an administrator or executor in his representative capacity. We are inclined to think this view would prevail if the complaint were properly framed, but we think the answer must be held good enough for a complaint framed as the one before us. It is settled law that the general bond of an administrator does not extend to his acts or omissions in making and accounting for sales of the intestate's real estate, but extends only to the management and disposal of the personal estate. *Worgang* v. *Clipp*, 21 Ind. 119; *Reno* v. *Tyson*, 24 Ind. 56; *Colburn* v. *State, ex rel.*, 47 Ind. 310. It will be observed that it is not stated in any of the specifications of the breaches of the bond, that the money converted, wasted or misapplied was derived from the personal estate of the decedent. There is, therefore, nothing in these specifications from which it can be inferred that there was any breach of the bond in suit. It is, however, alleged in the introductory part of the complaint that the "administratrix received money belonging to the estate in the sum of $2,000, being the proceeds of the sale of personal property of the said decedent, and of debts owing to said decedent and for timber trees sold from, and the rents of lands of said decedent received by her and accrued before the death of the decedent;" but it is not averred, directly or indirectly, that it was any part of this $2,000 that was wasted, converted or misapplied. For anything that appears on the face of the complaint this sum was duly administered by the administratrix. There is another fact which is to be kept in mind, and that is, that the complaint on its face shows that the administratrix sold real estate, and we can not say that the money wasted, misapplied or converted by her was not received from the sale of this real estate, nor can we say that it was not this money which she was ordered to pay into court. An answer to such a complaint, showing a full administration of all the personal estate, must

be deemed sufficient, for if all the personal estate was duly administered, then the condition of the general bond was fully performed. No error was committed in overruling the demurrer to the second paragraph of the answer. The third paragraph of the answer is very much fuller and much better drawn than the second, and is clearly good.

We do not think it necessary to examine the questions presented by the motion for a new trial, for the reason that we think the complaint entitles appellant's relator to nothing more than merely nominal damages, and if there was error we could not reverse.

Judgment affirmed.

Filed Dec. 20, 1883. Petition for a rehearing overruled March 14, 1884.

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No. 10,544.

KERR v. HAVERSTICK ET AL.

JUDGMENT.—*Default.—Ten Days' Service.—Statute Construed.*—Where a judgment by default was rendered on the tenth day after the day on which the summons in the cause was served, computing the time by excluding the day of service, and including the return day of the writ, the service was sufficient under section 315 of the civil code of 1852, as amended by the act of March 6th, 1877 (Acts 1877, p. 105).

PROMISSORY NOTE.—*Interest After Maturity.—Measure of Damages.—Interest on Judgment.*—An interest-bearing promissory note, which is silent as to interest after its maturity, will thereafter bear the same rate of interest as it lawfully bore before maturity, and such rate of interest will be the proper measure of damages in an action upon the note. While the act of February 5th, 1873, regulating interest on judgments (1 R. S. 1876, p. 600, *note* 1), remained in force, it was lawful to provide in the judgment that it should bear the same rate of interest expressed in the note upon which it was rendered.

SHERIFF'S SALE.—*Real Estate.—Execution.—Inadequacy of Price.—Setting Aside Sale.*—A sheriff's sale on execution of real estate of the alleged value of $6,400, subject to a mortgage of $4,000, for the sum of $5, will not be set aside merely on the ground of inadequacy of price.

From the Superior Court of Marion County.

J. B. Julian and *J. F. Julian*, for appellant.

R. B. Duncan, C. W. Smith and *J. S. Duncan*, for appellees.

HOWK, C. J.—This suit was commenced by the appellant Kerr against the appellees, on the 25th day of January, 1881. The objects of the suit, at the time of its commencement, appear to have been to obtain the review of a certain judgment, which the appellee Haverstick, on the 2d day of October, 1877, had recovered against the appellant and George A. Kirkpatrick, in the court below, for alleged errors of law appearing in the record, and to set aside a sheriff's sale of certain real estate of the appellant upon an execution issued on such judgment. The demurrer of the appellee Haverstick to the original complaint was sustained by the court upon the ground, as we may suppose, that the complaint showed upon its face, that appellant had not commenced his suit for the review of the judgment within three years after its rendition, as the statute then in force required. 2 R. S. 1876, p. 247, section 586. This decision was reversed by the general term, for the reason that the complaint did not show that the appellant was not under disability, and that, in such case, the limitation could only be taken advantage of by special answer. *Kent* v. *Parks*, 67 Ind. 53.

Afterwards, on May 25th, 1881, the appellant changed the form of his suit and filed a written motion in two paragraphs, to set aside the judgment so rendered against him, in favor of appellee Haverstick, on the 2d day of October, 1877, and the sheriff's sale of his real estate upon an execution issued on such judgment. The separate and several demurrers of the appellees Haverstick and Huffman, to each of the paragraphs of the appellant's motion or complaint, for the alleged want of facts therein, were overruled by the court as to the first paragraph, and sustained as to the second and third paragraphs. The appellee Haverstick answered in two special paragraphs, to each of which the appellant's demurrer, for the alleged want of facts, was overruled by the court. To this

ruling, appellant excepted, and, declining to reply or plead further, judgment was rendered against him for appellees' costs. Upon appeal, this judgment was affirmed by the general term, and from the judgment of the general term, this appeal is prosecuted.

In their brief of this cause, the appellant's counsel say: "It is claimed by appellant, that the judgment (of October 2d, 1877,) was void: 1. Because the process had not been served for the full term of ten days when it was taken; and 2d. That said judgment embraced interest from the time of the maturity of the note sued on to the date of the judgment, at the rate of ten per cent., and that, from that time, the judgment was made to bear interest at the rate of ten per cent. until paid." As to the first objections to the judgment, the record shows that it was rendered on the tenth day after the date of the service of process, being the return day of the writ. This was sufficient service of process to authorize the rendition of the judgment. *Monroe* v. *Paddock*, 75 Ind. 422.

The second objection to the judgment is not well taken. The rate of interest which the note in suit bore before it became due was the rate after maturity, and the statute then in force provided that the judgment should bear the same rate of interest. *Shaw* v. *Rigby*, 84 Ind. 375 (43 Am. R. 96); 1 R. S. 1876, p. 600, note 1.

It is further claimed on behalf of the appellant, that the sheriff's sale of his real estate upon execution issued on said judgment, "for less than one-tenth part of its value," was invalid and void. Upon this point, appellant's counsel say: "An interest in real estate, worth $2,400, is sold for $5, and is claimed to be held on that sort of consideration. This court has not, heretofore, sustained a sale made upon such a consideration. It is fraudulent *per se*, and certainly this part of the motion ought to have been sustained." Counsel's statement of this point differs materially from the statement of the same objection to the sheriff's sale, in appellant's motion or complaint. There, it was alleged that the real estate,

sold by the sheriff for $5, was of the value of $6,400, but was mortgaged for $4,000. The sheriff's sale of the real estate thus mortgaged, and, of course, subject to such mortgage, can not be set aside for mere inadequacy of price; and no other objection was urged to the sale, except the supposed invalidity of the judgment, and that objection, as we have seen, is not well taken.

We find no error in the record which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed March 14, 1884.

No. 10,276.

DRUM v. STEVENS.

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SPECIFIC PERFORMANCE.—*Complaint.—Agreement.—Statute of Frauds.*—A complaint for the specific performance of a parol contract to convey land is good without averring an agreement to convey, if it allege facts from which the law will imply such an agreement, and also facts which take the case out of the statute of frauds.

SAME.—*Possession.*—Where a parol contract for the conveyance of lands is taken out of the statute of frauds by the delivery of possession to the vendee and the making of improvements, the right to specific performance is not lost by a temporary cessation of actual possession under circumstances which, however, indicate an intention not to surrender the right.

SAME.—*Husband and Wife.—Contract.—Evidence.*—The rights of a married woman acquired by contract can not be affected by another contract made by the husband not in her presence, nor shown to be by her authority, and evidence thereof is not admissible.

PLEADING.—*Denial.—Harmless Error.*—Where the general denial is pleaded, there is no injury in sustaining a demurrer to an argumentative denial.

INSTRUCTION.—*Evidence.—Harmless Error.*—A mistake in stating to the jury that a fact is averred in the complaint, which only appears by necessary implication, is harmless. So, also, in enumerating the facts necessary to entitle the plaintiff to recover, the omission of an essential fact, which is, however, shown by the evidence without conflict, is harmless.

From the Wells Circuit Court.

J. S. Dailey and *L Mock*, for appellant.

T. W. Wilson, for appellee.

BLACK, C.—Harriet Stevens sued the appellant for specific performance of a parol contract for the conveyance by the latter to the former of certain real estate—a town lot.

After the filing of the transcript in this court, said Harriet died, and by agreement Samuel P. Stevens, her sole heir, was substituted as appellee.

By the assignment of errors the appellant questions the sufficiency of the complaint, and complains of the action of the court in sustaining a demurrer to the second paragraph of an answer of two paragraphs, and in overruling the appellant's motion for a new trial.

The complaint, omitting its title and the signature of the plaintiff's attorney, was as follows:

"Harriet Stevens, plaintiff, complains of John Philip Drum, defendant, and says that on the — day of August, 1880, the plaintiff, by a parol contract, purchased of the defendant Philip Drum the following real estate in Wells county, Indiana, to wit: Lot number sixty-one (61), in Curryville, as the same is designated and described on the recorded plat of said town, for the sum of $25, and that said plaintiff, under and by virtue of said contract with said John Philip Drum, and by and with his consent, took immediate possession of said premises, and made lasting and valuable improvements thereon, and has ever since held peaceable and quiet possession and control of the same; that long before the commencement of this suit the said plaintiff was ready and willing to pay said purchase-money, and that she offered to pay said defendant Philip Drum the said purchase-money, and demanded of him that he perform his contract by making plaintiff a deed in fee simple for said real estate, which he refused to do, and that plaintiff is still willing to pay said purchase-money, and brings the same here into court for the use of said defendant. Wherefore plaintiff demands that the defendant Philip Drum be compelled by the order and judgment of this court to specifically perform his said contract, or that on his failure or refusal to do so, a commissioner be appointed by the court to make, ex-

ecute and deliver to the plaintiff a good and sufficient deed in fee simple for said real estate, and other proper relief."

It is objected, on behalf of the appellant, that it was not averred in the complaint that the defendant entered into any agreement or made any promise to convey the real estate, or to do any act which he failed to do.

A court of equity is not without power to require the execution of a deed of conveyance of real estate in an action therefor, though the evidence should not show an express agreement for the execution of a deed. The ground on which a court of equity proceeds, where, to use the common expression, the contract has been taken out of the statute by part performance, is not that there is a valid contract, but that unless the court interpose one party will be enabled to defraud the other.

A parol gift of land may be so far executed that the donee who has been put into possession and has made expenditures for lasting improvement will be entitled to a decree for a conveyance. *Lobdell* v. *Lobdell*, 36 N. Y. 327; *Freeman* v. *Freeman*, 43 N. Y. 34 (3 Am. R. 657); Pom. Con., sections 130, 131.

Besides, the full ownership of land, the legal title, does not pass by mere delivery; and an agreement to sell land, or a purchase of land, implies an agreement or understanding that the vendor shall do what is necessary to transfer the full ownership, the legal title.

Under the code, it is sufficient for a party to state, in his pleading, the actual facts on which his cause of action or his defence is based. Facts which the law will imply from other facts stated need not be pleaded. A contract may be pleaded according to its legal effect.

The complaint is loosely drawn, and perhaps by motion the plaintiff might have been required to make it more definite, but looking, as a court of equity, to substantial justice between the parties, we think the complaint not liable to the objection made by counsel.

The second paragraph of the answer amounted to nothing more than an argumentative denial. The first paragraph was a general denial, and the issue formed thereby was tried. Therefore, there was no available error in sustaining the demurrer to the second paragraph. This is such a well settled rule of practice in this State that the citation of authority is not needed.

Objection is made to an instruction to the jury, on the ground that in stating therein the nature of the plaintiff's cause of action the court represented the complaint as alleging "that it was agreed that when that sum" (the consideration mentioned in the complaint) "should be paid by the plaintiff, the defendant should make the plaintiff a deed for the lot." This was not specifically alleged in the complaint. Of the making of such an agreement by the parties, the plaintiff had given positive evidence on the trial. We think this was not a material variance, but that the complaint might have been amended on the trial so as to correspond with this evidence; the cause of action would not thereby have been materially changed; and the fact that the court, in its instruction, treated the complaint as so amended ought not to work the reversal of the judgment.

It is objected that the court, in instructing the jury, did not require that the possession of the vendee should be taken under or by virtue of the contract.

The evidence of both parties clearly showed that the plaintiff and her husband went into possession and made lasting and valuable improvements, and that the possession was taken with the consent of the defendant, and that the improvements were made with his knowledge and consent.

There was a conflict in the evidence as to whether the contract under which possession was taken was made with the plaintiff or with her husband, but that a contract was made, and that the possession was taken pursuant thereto, and that the improvements were made in reliance thereon, the evidence showed without dispute. The jury found expressly

that the contract was made between the plaintiff and the defendant for the conveyance of the real estate to the former; that she took possession; that she made or caused to be made valuable and permanent improvements, of the value of $300; that her money, amounting to $285, was invested in said improvements; that she had tendered to the defendant the purchase-money and demanded of him a deed before suit, and that she had kept the tender good and deposited the purchase-money in the court for the defendant's use.

Under the circumstances, we can not regard the failure to instruct the jury that the possession must have been taken pursuant to the contract as an available error.

The eighth instruction was as follows:

"If you find from the evidence that the plaintiff, after buying the ground and making improvements, voluntarily abandoned it to the defendant or turned it over to and put the defendant in possession, and that the defendant was so in possession with the plaintiff's consent at the time suit was brought, then the plaintiff can not maintain this action. But if you find that when the plaintiff left the actual possession she locked the house up and put the keys into the hands of an agent, with directions to rent the premises, and that afterward the defendant, without any permission from the plaintiff, went on the premises and took possession thereof without leave, then his possession so acquired would not at all interrupt or prevent the plaintiff's right of action, if she had one before she did so." There was evidence to which this instruction was pertinent.

When, under a verbal contract for the sale of land, possession has been taken by the vendee, and thereby a right of action for specific performance of the contract has accrued to him, if the possession be abandoned by him with intent to surrender all right and interest so acquired, the original possession would thereby cease to be available as a part performance; but when possession so obtained is temporarily suspended or interrupted, under such circumstances as indicate

that the vendee does not intend thereby to waive or surrender his accrued right of action for specific performance, it will not be defeated thereby.

We think the instruction in question was not subject to objection from the appellant.

On the trial the appellant offered to prove by his own testimony, that the plaintiff's husband was indebted to the appellant in certain sums for boarding and keeping said husband's horses, and that it was agreed by the appellant and said husband, out of the plaintiff's presence, at what time was not stated, that the appellant was not to make a deed for the lot mentioned in the complaint to said husband, until said sums were paid to the appellant, and that said sums were due and owing to the appellant from said husband.

This offered evidence would not tend to disprove the alleged contract with the plaintiff, and could not affect her contract relation with the appellant. It was irrelevant, and was rightly excluded.

The same may be said of another offer of like evidence, the exclusion of which was stated as a cause for a new trial.

Among the reasons stated in the motion for a new trial was the making of a certain remark by the court to counsel for the appellant, in the presence and hearing of the jury. By reference to the bill of exceptions we find that the language of the court was materially different from that set out in the motion. It is, therefore, improper for us to decide whether the remark actually made was an irregularity which would have been good ground for a new trial.

We find no available error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed March 14, 1884.

No. 9140.

CONAWAY v. ASCHERMAN ET AL.

SUPREME COURT.—*Answer to Assignment of Errors.—Defective Certificate.*—It is no answer to an assignment of errors to allege that the clerk's certificate is not dated with certainty.

SAME.—*Appeal.—Notice.—Co-party refusing to Join.*—Where an appeal is taken during term time, and an appeal bond and the transcript are filed within the time fixed by the trial court, by some only of the parties to the judgment, the other parties may be made co-parties to the appeal without notice by joining them as appellees in the assignment of errors.

SAME.—*County Commissioners.—Highway.*—Where, in a highway case appealed to the circuit court, the county commissioners are ordered to pay a certain part of damages assessed in favor of a land-owner, that fact does not make such board a proper party to an appeal to the Supreme Court.

HIGHWAY.—*Description of Location.—Certainty.*—It is sufficiently certain, in a petition for a highway, to so describe the proposed highway that a surveyor may locate the same.

SAME.—*Petition.—Notice.—Public Utility.—Owners' Names.*—Such petition need not aver that notice has been given, nor that the proposed highway will be of public utility, but should state the names of the owners of lands over which it will run, even in cases where the location of a highway is asked to be changed.

SAME.—*Essential Averment.—Petitioners.*—Such petition should aver not only that the petitioners are freeholders, but that six of them reside in the immediate neighborhood of the highway, or it will be fatally defective.

From the Ohio Circuit Court.

J. B. Coles and *W. S. Holman*, for appellant.

S. R. Downey and *R. L. Davis*, for appellees.

ELLIOTT, J.—Questions are made in this court by answers filed to the assignment of errors, which first require attention.

The answer of Charles French shows that he was not a party to the action in which the judgment was rendered and that he disclaims all interest in the controversy. The record sustains this answer, and as to him the appeal is dismissed and judgment will go in his favor for costs.

The other appellees answered the assignment of errors in four paragraphs. The first is that the certificate of the clerk is not dated upon a "day certain or ascertainable." This we

regard as an insufficient answer, for the reason that the date of the certificate does not affect the substantial rights of the parties.

The second paragraph is that there is a defect of parties in this, that Oatman and Cutler, who were plaintiffs below, are not made parties to the appeal. We find the names of these appellees duly given in the assignment of errors, and that brings them before the court, for the reason that the appeal was taken during the term. We gather from the record these dates: Judgment was rendered on the 11th day of September, 1880, and the appellant was given until the first Saturday of the then ensuing term to file an appeal bond. The bond was filed within the time prescribed, and the transcript was filed in this court on the 16th day of December, 1880, less than sixty days after the filing of the appeal bond. As the appeal was taken in such a manner as to render a notice unnecessary, nothing more was requisite than to properly name the parties in the assignment of errors.

It is argued that the answer presents a question of fact for trial. We think otherwise. Where the face of the record fully shows that the appeal was so taken as to render notice unnecessary, and the assignment of errors shows that the parties are properly named and included therein, the court will decide the question upon the record unless there is a plea directly impeaching the record in some method and for some cause recognized by the rules of law.

The third paragraph of the answer alleges that the board of commissioners were directed to pay $100 out of the county treasury as the share of the county towards paying the damages assessed in favor of property owners injured by the opening of the highway described in the petition, and they are not made parties to this appeal. The answer is plainly bad. It was not necessary to make the commissioners parties.

Having disposed of these preliminary questions we now come to the main case.

The appellees petitioned the board of commissioners of

Ohio county to change and relocate a highway, and the appellants appeared before the board and resisted the petition. Their first step was to move to dismiss the petition for the following reasons: 1st. The petition does not state sufficient facts. 2d. The petition does not fully set out the names of the owners of the land through which it is proposed to change the highway. 3d. The petition does not set out the names of the owners of the land over which the highway sought to be changed is located. 4th. Because the description of the proposed highway is not sufficiently definite. 5th. The petition does not sufficiently describe the way sought to be vacated. 6th. The notice of the petition was not sufficient. 7th. The change is not of public utility. 8th. The petition is not signed by twelve freeholders. 9th. The petition does not state that the change will be of public utility. This motion was overruled by the commissioners, was renewed in the circuit court on appeal, and again overruled, and the question properly saved.

The description of the line of the proposed highway is reasonably certain, and this is sufficient, for technical accuracy is not required. A description which is sufficiently definite to enable a surveyor to locate the highway is all that the law requires. *Farmer* v. *Pauley*, 50 Ind. 583; *Sowle* v. *Cosner*, 56 Ind. 276; *DeLong* v. *Schimmel*, 58 Ind. 64; *Scraper* v. *Pipes*, 59 Ind. 158; *McDonald* v. *Wilson*, 59 Ind. 54.

The law does not require that the petition shall contain any averment as to notice.

It is not necessary for the petition to aver that the proposed road will be of public utility. *Bowers* v. *Snyder*, 88 Ind. 302. The question as to whether the road will or will not be of public utility may be made an issue, but the statute does not require that this averment should be made in the petition, although it does require that in the proper case this fact shall be established. The question of utility is to be referred to the viewers and must be passed upon by them. R. S. 1881, secs. 5016, 5023.

The petition should state the names of the property-owners over whose lands the proposed way will be located. This is true of cases like this, where the change and relocation of a highway will vacate an existing way running over the lands of more than one person, and relocating it upon lands held by two or more different owners. *Hays* v. *Campbell*, 17 Ind. 430; *Hughes* v. *Sellers*, 34 Ind. 337.

The petition should show that the petitioners are freeholders, and that six of them "reside in the immediate neighborhood of the highway proposed to be located, vacated, or of the change to be made." R. S. 1881, sec. 5015. This is necessary in order to make it appear that the petitioners have an interest in the subject-matter of the legal controversy which the petition initiates. Without such an allegation it can not be known that there is any right or even color of right in the petitioners to set the machinery of the law in motion. It is a familiar rule, pervading all branches of the law, that one who invokes the assistance of the courts must show that he has an interest in the subject-matter upon which he asks the court to pass judgment. If it were otherwise, mere strangers might apply to the courts to the vexation of those whom they chose to harass by litigation. Another familiar rule is that one who asks a right under the statute must show himself to be a member of the class embraced within the statutory provision. Unless there are such averments as we have mentioned, it will not appear that the petitioners are entitled to petition for the road. *Early* v. *Hamilton*, 75 Ind. 376.

There is a plain and important difference between a direct and a collateral attack upon the judgment of a board of commissioners in laying out highways, and in losing sight of this difference the trial court was led into confusion and error. Many errors and irregularities are fatal where the attack is a direct one which would not receive consideration in a collateral attack.

Many defects are waived by failing to object at the proper time, but in this case the objections were made at the earliest

stage of the proceedings, were kept up throughout the case, and have been properly saved by a bill of exceptions seasonably filed.

The petition is fatally defective for the reasons indicated, and, for the error in overruling the motion to dismiss, the judgment must be reversed.

Filed March 14, 1884.

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No. 9418.

VAUGHAN v. GODMAN ET AL.

DEED.—*Infant Grantee.—Acceptance.—Delivery.—Pleading.—Quieting Title.—Conveyance by Parent to Child.*—A complaint by a father against his daughter to quiet title alleged title in the plaintiff, the making and recording of a deed by the plaintiff to the defendant, then a child of five years, without her knowledge, and that the deed was never delivered to her, but always retained by the plaintiff. It was also alleged that the plaintiff retained the possession, and improved the property and made and recorded the deed only to avoid an unfounded claim against him, upon which suit was threatened.

Held, that as the ultimate fact of non-delivery was distinctly alleged the complaint was good on demurrer.

Held, also, that the circumstances of the transaction, as alleged, were merely evidence upon which the court could not, as a matter of law, determine on demurrer that there was a delivery, notwithstanding the express averment that there was none.

SAME.—*Delivery.*—For a valuable collection of authorities as to what constitutes delivery of a deed, see opinion.

From the Tippecanoe Circuit Court.

W. C. Wilson, J. H. Adams, J. A. Wilstach, J. W. Wilstach, W. D. Tobin and — *Walsh*, for appellant.

J. R. Coffroth and *T. A. Stuart*, for appellees.

ZOLLARS, J.—Appellant commenced this action against his daughter Catharine and her guardian, McGrath. The purpose of the action was to set aside a deed from appellant to the daughter, and quiet the title to the real estate therein described in him, or, if this could not be done, to have a lien de-

clared in his favor for the amount expended upon the real estate subsequent to the deed, and for other sums expended for the daughter.

Since this appeal was taken Catharine has been married, the guardian has been discharged, the case dismissed as to him, and the husband of Catharine, Claude Godman, has been made a party. This, as counsel for appellant concede, eliminates from the case the question of a lien for the amount expended by appellant, and leaves as the sole question for decision the validity and force of the deed.

The case is presented for review upon the ruling of the court below in sustaining a demurrer to the third paragraph of the complaint. The averments of that paragraph, so far as they need be set out, may be summarized as follows: Appellant was the owner of parts of two lots in the city of Lafayette, which he acquired by purchase and deeds—one in the year 1864 and one in 1865. This property was bought for a family residence, was paid for by appellant out of his earnings, and constituted the whole of his property. In 1859 appellant married Mrs. Shay; she did not at that time, nor did she at any time thereafter, own any property. Appellee Catharine was born in 1861; when she was five years old a brother of the mother's deceased husband threatened to sue appellant for a debt of $500, due him from the deceased husband, which appellant had never, in any manner, obligated himself to pay. At this juncture appellant consulted a distinguished lawyer, and upon his advice, as stated in the complaint, appellant and his wife "conveyed both said pieces of real estate to their said daughter, said defendant Catharine Vaughan, in order that the said plaintiff and his wife might not be molested with a lawsuit, and that the property might be preserved in the family, without expense of a litigation, by a deed dated October 19th, 1867, without any consideration, except the purpose of preserving the property, and for the expressed consideration of one dollar."

The averments of the complaint in relation to the delivery

of the deed are as follows: "Plaintiff further avers, * * that said Catharine Vaughan, at the date of said deed, was only of the age of five years; that said deed was never delivered to her; * * * that this plaintiff, without any knowledge on the part of said Catharine Vaughan, took said deed, on the 21st day of October, 1867, to the office of the recorder of said county, and procured and paid for the recording of the same, and on or about the 1st day of November, 1867, obtained the same again from said recorder, and placed the same with his own papers, where it has ever since remained, and has never left his possession, nor been in the possession of said Catharine Vaughan, nor any other person except this plaintiff and his counsel. And the plaintiff further says and expressly avers, that said deed to said Catharine Vaughan was never delivered to her, nor to any person or persons for her; she had no knowledge whatever of said deed at the time it was signed, nor for more than twelve years thereafter, and the title was never accepted by her, nor possession taken by her, nor by any person for her (except the recent possession of said guardian appointed December 29th, 1880, be accounted such possession)."

It is further made to appear by the complaint that appellant occupied the property as a family residence until the death of his wife, and for some time thereafter, and remained in the possession until the appointment of the guardian for Catharine in 1880, paid the taxes, made improvements, collected the rents, etc.

McGrath was appointed guardian on the election of the daughter. After his appointment, and until the beginning of this suit, he collected the rents. It is further averred that at the solicitation of the daughter the guardian was about to apply for an order to sell the property.

The first and most important question presented by this complaint is, are the facts stated such that the court may pro-

nounce upon them, as a matter of law, that the deed was or was not delivered?

The contention of appellee is that the complaint shows a delivery and acceptance of the deed, that a voluntary conveyance is good between the parties, and that appellant can not call the deed in question, because he had a fraudulent purpose in its execution. The position of appellant is the converse of this.

The adjudications establish the following, viz.:

A deed is not effectual to convey title without a delivery or what is equivalent to a delivery. *Tharp* v. *Jarrell*, 66 Ind. 52; *Love* v. *Wells*, 25 Ind. 503; 3 Washb. R. P. (4th ed.), p. 282, *et seq.*; *Fletcher* v. *Mansur*, 5 Ind. 267; *Gray* v. *State*, 9 Ind. 25.

A deed may be delivered by words without actions, and by actions without words. It may be delivered without being actually handed over. It may be delivered without being put into the hands of the grantee, as by leaving it with a third person. *Nye* v. *Lowry*, 82 Ind. 316; *Dearmond* v. *Dearmond*, 10 Ind. 191; *Burkholder* v. *Casad*, 47 Ind. 418; *Fewell* v. *Kessler*, 30 Ind. 195; *Somers* v. *Pumphrey*, 24 Ind. 231; *Stewart* v. *Weed*, 11 Ind. 92; *Guard* v. *Bradley*, 7 Ind. 600; *Squires* v. *Summers*, 85 Ind. 252. And so a deed may be delivered by the grantor having it recorded, if his purpose in so doing is to effectuate a delivery. *Taylor* v. *McClure*, 28 Ind. 39; *Somers* v. *Pumphrey*, *supra*; *Mallett* v. *Page*, 8 Ind. 364; 3 Washb. R. P. (4th ed.), p. 284; *Tallman* v. *Cooke*, 39 Iowa, 402.

If a deed is found in the possession of the grantee, or is recorded by the procurement of the grantor, a delivery will be presumed, but this presumption is not conclusive.

Such facts are competent evidence of a delivery. From them there arises a presumption of a fact, which makes a *prima facie* case. This presumption may be overthrown by evidence. The question of delivery is a question of fact to be determined on the evidence. In all disputes as to whether

or not a deed has been delivered, the most important inquiry is to ascertain the intent of the grantor in the act, or several acts, which, it may be claimed, constitute a delivery. Did he intend to part with all control over the deed? Did he intend to divest himself of the title and lodge it in the grantee?

In the case of *Mallett* v. *Page*, *supra*, it was said: "It seems equally clear that the mortgage was delivered. It was left for record at the proper office, and that is *prima facie* a delivery. * * * A deed may be delivered by any acts or words evincing the intention of the grantor to deliver it."

In the case of *Berry* v. *Anderson*, 22 Ind. 36, it was said: "To constitute a delivery there must be *intention* to part with control over the deed as its owner."

It was said in the case of *Somers* v. *Pumphrey*, *supra*, that "The law does not prescribe any particular form of words, or actions, as necessary to consummate a delivery. Anything done by the grantor, from which it is apparent that a delivery is thereby intended, either by words or acts, or by both combined, is sufficient."

In the case of *Hotchkiss* v. *Olmstead*, 37 Ind. 74, this court said: "To constitute a delivery there must be an intention to part with the control over the instrument, and place it under the power of the grantee, or some one for his use."

It was said in the recent case of *Nye* v. *Lowry*, *supra*: "Some question is made as to what constitutes a delivery. 'It is much a question for the jury in each particular case.'" See, also, to the same effect, *Dearmond* v. *Dearmond*, *supra*.

In the case of *Squires* v. *Summers*, *supra*, it was said that "The possession by the grantee of a deed regularly executed is *prima facie* evidence of its delivery." See, also, *Burkholder* v. *Casad*, *supra*.

In 3 Washburn on Real Property (4th ed.), p. 286, the author says: "In undertaking to define what will constitute a delivery of a deed, it is said that it may either be 'actual, that is, by doing something, and saying nothing; or verbal, that is, by saying something, and doing nothing; or it may be

by both.' But it must be by something answering to the one or the other, or both these, and with an intent thereby to give effect to the deed." See, also, the same volume, pp. 291 and 296; *Methodist Church* v. *Jaques*, 1 Johns. Ch. 450.

In the case of *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264, the court said: "The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts or words or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit."

A part of the syllabus in the case of *Mitchell* v. *Ryan*, 3 Ohio St. 377, which states correctly the points decided, is as follows: "The record of a deed is *prima facie* evidence of its delivery. Such *prima facie* case may be rebutted by proof." See, also, *Byars* v. *Spencer*, 101 Ill. 429.

In the case of *Jones* v. *Swayze*, 42 N. J. 279, the court, in reviewing the authorities, said: "In *Zenos* v. *Wickham*, 106 E. C. L. Rep. 381, reviewed in the Exchequer Chamber (108 E. C. L. Rep. 435), and ultimately decided in the House of Lords (108 E. C. L. Rep. 861), it appears that the circumstances which go to make out a delivery are to be treated as indications of intention, and that the fact of delivery resolves itself into a question of intention."

In the case of *Gilbert* v. *North American Fire Ins. Co.*, 23 Wend. 43, it was said, citing *Jackson* v. *Perkins*, 2 Wend. 308, that "The fact that the deed had been recorded, was only *prima facie* evidence of a delivery, which might be rebutted." See, also, Martindale Law of Conv., sections 204, 205, 206, 212 and 222, and cases cited under each section.

As there must be a delivery, so there must be an assent or acceptance by the grantee, in order that title may be conveyed by the deed. The acceptance must be contemporaneous with the delivery, unless the act of delivery be a continuing one in its nature, such as leaving the deed with a third party, hav-

ing it recorded, etc. As in the case of delivery, so the assent or acceptance may be evidenced by word, or any act which shows the intent. In some cases, a presumption of acceptance will arise from the nature of the grant, the manner of the delivery and the relation of the parties. This is especially so in cases of infant grantees, which are said to be exceptions to the general rule.

The weight of authority seems to be that if the grant to an infant be a gift, and beneficial, and the mode of delivery is by the grantor having the deed recorded, the acceptance by the infant will be presumed, as contemporaneous with the delivery, even though the infant may have no knowledge of the grant. It is said in a recent treatise: "And where a father made a deed to his minor son and caused it to be recorded, it was held to be a sufficient delivery to the infant, and that the title passed thereby. The law presumes more in favor of the delivery of a deed in case of a voluntary settlement, especially when made to an infant." Martindale Law of Conv., section 205.

Again: "It seems that where a grant is a pure unqualified gift, the presumption of acceptance can only be rebutted by proof of actual dissent, especially if the grantees are infants, or persons under disability to assent." Martindale Law of Conv., section 209.

Again: "Voluntary conveyances, made to infants and persons under disability, * * * may be considered, in some degree, as forming exceptions to the general rule, that an actual acceptance is necessary." Martindale Law of Conv., section 214.

In the case of *Cecil* v. *Beaver*, 28 Iowa, 241 (4 Am. R. 174), Mr. Chief Justice DILLON, in delivering the opinion of the court, said: "Where the deed to the child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is in law a sufficient delivery to the infant, and the title to the lands conveyed will pass thereby. In such case actual manual delivery and a formal

acceptance are not necessary." In this case the facts were that the grantees were the children of the grantor, and were minors at the time the deeds were made; no consideration was paid by the children; the father caused the deeds to be recorded, but kept possession of them and of the land, and that soon after the execution of the deeds the children were made acquainted with the fact. The action was by the father against the children to quiet the title in him.

In the case of *Mitchell* v. *Ryan, supra,* the facts were that without any money consideration the father made a deed to a minor child and had it recorded. When the deed was made and recorded, the grantee was absent and knew nothing of it, nor did she know of it during her life. The father retained the possession of the deed and of the land. The suit was between the lessees of the heirs of the grantee and a subsequent grantee of the father. Mr. Chief Justice THURMAN, in delivering the opinion of the court, said: "But where the grant is a pure, unqualified gift, I think the true rule is that the presumption of acceptance can be rebutted only by proof of dissent; and it matters not that the grantee never knew of the conveyance, for as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he *did* know of and *rejected* it. If this is not so, how can a deed be made to an infant of such tender years as to be incapable of assent? Is it the law, that if a father make a deed or gift to his infant child, and deliver it to the recorder to be recorded for the use of the child, and to vest the estate in it, the deed is of no effect until the child grow to years of intelligence and gives its consent? May the estate, in the meantime, be taken for the subsequently contracted debts of the father, or will the statute of limitations begin to run in favor of a trespasser, upon the idea that the title remains in the adult? Or, will the conveyance entirely fail, if either grantor or grantee die before the latter assent? I do not so understand the law. In such a case, the acceptance of the grantee is a presumption of law, arising

from the beneficial nature of the grant, and not a mere presumption of an actual acceptance. And for the same reason that the law makes the presumption, it does not allow it to be disproved by anything short of actual dissent."

It is not necessary for us, in this case, to express an opinion as to the correctness of the doctrine announced by the learned judge, so far as it may be applicable to adult grantees. So far as it applies to infant grantees, it commends itself to our judgment. See 3 Washb. Real Prop. (4th ed.), p. 284. A part of the syllabus in the case of *Spencer* v. *Carr*, 45 N. Y. 406 (6 Am. R. 112), which is a correct statement of the ruling in the case, is, "In the case of a grantee only six years of age, where the grant is beneficial, an acceptance of the deed will be presumed." In this case the grantors, the parents, had caused the deed to be recorded. See, also, *Bryan* v. *Wash*, 7 Ill. 557; *Reed* v. *Douthit*, 62 Ill. 348; *Rivard* v. *Walker*, 39 Ill. 413.

It was said by this court, in the case of *Guard* v. *Bradley*, 7 Ind. 600, in speaking of infant obligees in a bond: "The obligees were not present; but an unconditional delivery to the grandmother for their use, and their subsequent acceptance of it, especially by bringing this suit, were sufficient. Besides, their acceptance may be presumed from the beneficial nature of the transaction."

When a deed has been delivered and accepted, the title vests in the grantee, and the subsequent possession of the deed by the grantor will not affect that title. *Squires* v. *Summers*, 85 Ind. 252, and cases cited.

Applying the rules above stated, how stands the case in hearing?

It is shown by the averments in the complaint that if title was conveyed by the deed, it was as a gift, which was beneficial to the infant grantee. If, then, the deed was delivered with the intention of conveying title, the grantee being an infant daughter, her acceptance will be presumed as of the

date of delivery. We need not, therefore, concern ourselves about what the guardian did.

The important question, then, and the one to which the arguments of appellant's counsel are directed, is, was there such a delivery? Are the averments of the complaint such that we can declare upon them, as a matter of law, that there was such a delivery? The averment in the complaint is twice repeated, that the deed was never delivered to the daughter appellee, nor to any person for her. This is the ultimate fact, and we think it is properly averred. It is true that in another portion of the complaint, it is stated that appellant and wife, by a deed, conveyed the property to the daughter. Ordinarily, the word "conveyed" implies both a delivery and acceptance, but it can not mean this much, when opposed in the same paragraph with the positive declaration that the deed never was delivered. That the property was the result of appellant's labor, and was all the property he owned; that he thought it was endangered by an unfounded claim; that the grantee was his daughter of tender years; that he and wife deeded the property to her without any money consideration, under the advice of a lawyer, to protect it from the unfounded claim, and thus, as stated, preserve it in the family; that without the knowledge of the daughter the deed was made and recorded; that she had no such knowledge for twelve years after the deed was so recorded; that during all that time appellant had, and still has, possession of the deed; that the property was bought for, and used as a family residence, and was improved by appellant, are all evidentiary facts, to be considered by the court or jury trying the cause, and may tend in greater or less degree to establish the ultimate fact, as to whether or not the deed was delivered.

They may show, or tend to show, whether or not, when appellant caused the deed to be recorded, it was with the intention of thereby consummating a delivery to appellee, and thus investing her with the legal title.

We can not pronounce, as a matter of law, upon the de-

murrer to the complaint, that these evidentiary facts set up therein overthrow the positive averment that the deed was never delivered. What weight should be given upon the trial to these evidentiary facts, thus alleged, it would not be proper for us to say in passing upon the demurrer. *Jones* v. *Swayze, supra; Somers* v. *Pumphrey, supra* (239 *et seq.*). See, also, *Tharp* v. *Jarrell*, 66 Ind. 52.

Nor do we think it would be proper at this time to express an opinion as to what might be the rights and remedies of the parties, should it be made to appear that the deed was in fact and in law delivered. It is sufficient that we hold the third paragraph good, and that the court below erred in sustaining the demurrer. On account of this error the judgment is reversed, with instructions to the court below to overrule the demurrer.

NIBLACK, J., did not participate in the decision of the cause.

ELLIOTT, J., dissents.

Filed March 15, 1884.

No. 11,077. 94 201 / 138 391

HANNAH, ADMINISTRATOR, *v.* COLLINS.

TAXES.—*Tax Title.—Evidence.—Deed.—Description.—Decedents' Estates.—Tender.—Warranty Deed.—Estoppel.*—Petition by an administrator to sell lands, and to quiet the title thereto against a tax title.

Held, that in such case it was not necessary to tender the money paid by the purchaser in discharge of the taxes.

Held, also, that the description "West part of the N. E. N. E., section 35, town. 23 N., R. 6 E., 30 acres," was good.

Held, also, that a defendant holding a tax title, *prima facie* good, need not show anything as to the levy of the taxes, or the meeting of the board of equalization.

Held, also, that a failure by the county auditor properly to transfer lands for taxation, or to charge them on the duplicate to the proper owner, or that some of the taxes accrued during a former ownership, are not objections to the validity of a tax title.

Held, also, that a sale of lands for taxes is invalid, if there be personal property liable to be seized therefor.

Held, also, that one who conveys lands with general warranty is estopped from claiming title by virtue of a tax sale, if any part of the taxes for which it was sold were upon it at the time of his conveyance.

From the Grant Circuit Court.

G. W. Harvey and —— *Brownlee*, for appellant.

A. Steele, R. T. St. John and *R. G. Steele*, for appellee.

BICKNELL, C. C.—This was a proceeding by the administrator of a decedent, whose land had been sold for delinquent taxes to defeat the title of the purchaser at the tax sale.

The complaint alleged that the decedent died seized of the land, and prayed for an order to sell the land to pay the decedent's debt, and that the cloud upon the title arising from the tax sale and deed be removed, and that the purchaser's lien on the land for taxes, if he had any lien, be adjusted, and that upon sale of the land the proceeds be applied first to the payment of all existing liens which were in force at the time of the decedent's death, next to the expenses of administration, and then in payment of all valid liens upon the land.

The cause was tried by the court upon the complaint, the general denial, special defences and replies thereto. The court found that the land was delinquent for taxes, and was duly returned delinquent and advertised for sale, and was duly sold for such taxes to Wilson and Gaunt, who assigned their certificate of purchase to the defendant Lewis W. Collins; that said land was not redeemed, and that after the end of the time for redemption the county auditor executed a tax deed for the land to said Collins, who has ever since been in possession of the land; that all the heirs at law of said decedent have conveyed all their interest in said land to said Collins, and that he is the owner in fee of said land.

The plaintiff's motion for a new trial was overruled; judgment was rendered upon the finding for costs against the plaintiff, and quieting the defendant's title.

The plaintiff appealed; he assigns for errors:

1. Overruling the motion for a new trial.

2. The court erred in rendering judgment, finding and decree in favor of said Lewis W. Collins, instead of declaring, finding and decreeing that said land was liable for the payment of said debts, etc.

3. The court erred in finding that the said tax title, by and through which said Collins claims said land, was and is a good and valid title.

4. The court erred in refusing to hold and find that the said Lewis W. Collins was estopped from claiming under said tax title.

No objection was made below to the form or substance of the judgment, and no motion was made to modify the judgment.

The second, third and fourth specifications of error present no question. *King* v. *Wilkins*, 10 Ind. 216; *Schofield* v. *Jennings*, 68 Ind. 232; *McFarland* v. *McFarland*, 40 Ind. 458.

For a new trial eight reasons are alleged, but the appellant in his brief discusses the validity of the tax title and nothing else. He says: "The controversy in the court is the tax title." He is therefore regarded as waiving everything else. He makes several objections to the validity of the tax deed.

We think it is not necessary for a defendant who has a *prima facie* title, by virtue of a tax deed made in conformity to law, to show anything as to the levy of taxes or as to a meeting of the board of equalization. See R. S. 1881, section 6480.

And we think the land was sufficiently described. The description was: "The west part of the N. E. N. E., sec. 35, town. 23 N., R. 6 E; 30 acres." In describing a part of forty acres, one of the regular subdivisions of the surveys of the United States, thirty acres, the west part of such subdivision, means all of it except ten acres off the east side extending from end to end. There is no uncertainty in such a description.

And we think that the fact that the land was not properly transferred for taxation by the county officers, and was not charged on the duplicate to the real owner thereof, is not a good objection to the validity of a tax deed. R. S. 1881, section 6489; *Cooper* v. *Jackson*, 71 Ind. 244. Nor is it ordinarily a valid objection that some of the taxes accrued during the ownership of a former proprietor of the land; the lien of the taxes remains notwithstanding the transfer of the land. *Cooper* v. *Jackson, supra.*

But a sale of the land for taxes is invalid where there is personal property liable to be seized therefor. And where, as in this case, a former owner of the land sells it subject to the taxes of 1876 and 1877, and makes a warranty deed therefor, he is estopped from claiming that land by purchase at a sale for the taxes of 1876 and 1877, which he is bound by his covenant to pay, and he is equally estopped where the land is sold for any taxes, of which the taxes against which he covenanted are a part.

A defendant can neither plead nor take advantage under the evidence of anything contradictory to or in conflict with his own warranty. *Miller* v. *Elliott*, 1 Ind. 484; *Sammons* v. *Newman*, 27 Ind. 508.

We think the defendant was estopped by his warranty from claiming title to the land in controversy under his tax deed. Ordinarily, in a suit by the owner of land sold for taxes to defeat the title of a purchaser at a tax sale, he can not recover without paying or tendering the taxes legally due. *Harrison* v. *Haas*, 25 Ind. 281; *McWhinney* v. *Brinker*, 64 Ind. 360. But this rule does not apply to this case.

This is a proceeding by an administrator to make assets to pay debts, including the taxes. In such a case he may in his petition, as was done here, ask that the land be sold subject to any valid claim of the holders of the tax deed, and he is not required to pay or tender the amount of such claim in order to show a valid cause of action.

We think the court erred in overruling the motion for a new trial, and for this error the judgment must be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, and this cause is remanded for a new trial.

Filed March 14, 1884.

No. 10,944.

SEAVEY, ASSIGNEE, *v.* MAPLES ET AL.

BANKRUPTCY.—*Jurisdiction to Collect Assets.*—The State courts have no jurisdiction of suits by an assignee in bankruptcy to collect assets of the bankrupt, such jurisdiction being exclusive in the bankruptcy court, by reason of the bankruptcy act of 1867.

From the Superior Court of Allen County.

P. A. Randall and *W. J. Vesey*, for appellant.

W. H. Coombs, J. Morris, R. C. Bell, C. H. Aldrich and *J. M. Barrett*, for appellees.

FRANKLIN, C.—This is a suit brought in the Allen Superior Court by appellant, as assignee in bankruptcy of the estate of Jacob C. Bowser, against appellees Maples and Bulger, upon two promissory notes executed to the bankrupt.

A demurrer, alleging that the State court had no jurisdiction of the subject-matter of the action, and that the complaint did not state facts sufficient to constitute a cause of action, was sustained to the complaint. The plaintiff declined to plead further, and judgment was rendered for the defendants for costs.

Error has been assigned upon the sustaining of the demurrer.

The only question discussed by appellant is as to the jurisdiction of the court.

As a general proposition, the Federal courts have jurisdiction over the enforcement of Federal laws. The 711th section, R. S. 1874, of the United States, provides that "jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States;" the sixth clause of which embraces "all matters and proceedings in bankruptcy." By section 563 of said Revised Statutes, it is provided that "The District courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy." By section 4972 of said Revised Statutes, "The jurisdiction conferred upon the District courts as courts of bankruptcy shall extend: First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy. Second. To the collection of all the assets of the bankrupt. Third. To the ascertainment and liquidation of the liens and other specific claims thereon. Fourth. To the adjustment of the various priorities and conflicting interests of all parties. Fifth. To the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors. Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

"The appellant concedes that State courts have no jurisdiction over matters and proceedings in bankruptcy, but insists that a suit by an assignee in bankruptcy to collect a debt due the estate he represents is not a matter and proceeding in bankruptcy within the meaning of the statute."

It will be seen that the District courts are made courts of bankruptcy; that the jurisdiction conferred shall extend to the collection of the assets of the bankrupt; and that the jurisdiction therein conferred upon the courts of the United States is *exclusive* of that of the several State courts. These

statutes all being passed at the same time must be construed together so far as they are *in pari materia;* but it appears to us there is but little, if any, room for construction, notwithstanding the authorities seem somewhat conflicting upon this question. The cases of *Kidder* v. *Horrobin*, 72 N. Y. 159, and *Clark* v. *Ewing*, 9 Bissell, 440, and, also, Bump on Bankruptcy (9th ed.), p. 231, hold in favor of the jurisdiction of the State Courts, while the following cases hold against such jurisdiction: *Newman* v. *Fisher*, 37 Md. 259; *Brigham* v. *Claflin*, 31 Wis. 607 (11 Am. R. 623); *Voorhies* v. *Frisbie*, 25 Mich. 476 (12 Am. R. 291); *Hallack* v. *Tritch*, 17 Nat. B. R. 293; *Olcott* v. *Maclean*, 16 Nat. B. R. 79; *Kecht* v. *Springstead*, 51 Iowa, 502; *Dodd* v. *Hammock*, 59 Ga. 403. While the weight of authority outside of this State appears to be against such jurisdiction in the State courts, we think in Indiana it should no longer be regarded an open question. Under the bankrupt act of 1867 it has been held in the cases of *Markson* v. *Haney*, 47 Ind. 31, and *Stanley* v. *Sutherland*, 54 Ind. 339, that the State courts did not possess such jurisdiction.

Under the revision of 1874, before referred to, in the case of *Sherwood* v. *Burns*, 58 Ind. 502, it was expressly held by this court that the State courts possessed no such jurisdiction, and that State courts could exercise jurisdiction in the collection of legal demands, where the sum did not exceed five hundred dollars, only when so directed by the court having charge of the estate of the bankrupt, which was subsequently approved in the case of *Dashing* v. *State*, 78 Ind. 357. And the same is substantially held in the case of *Blair* v. *Hanna*, 87 Ind. 298. And as this case is not claimed to be based upon such direction, we think the case of *Sherwood* v. *Burns*, *supra*, is decisive of the question under consideration. Notwithstanding the doubt that may have existed upon this question under the act of 1867, prior to the revision of 1874, the last decision of this court, above cited, leaves no doubt as to what the law now is, at least in Indiana, unless there has since been some change in the statutes upon this subject, and we

have not been referred to any such change, nor do we know of any. We must, therefore, hold that in this State the question is settled against such jurisdiction in the State courts, unless the decision in the case of *Sherwood* v. *Burns, supra,* be overruled; and, instead of overruling it, we think that it is in accordance with the provisions of the statute and the weight of authority, and should be adhered to.

The court having no jurisdiction of the subject-matter of the cause of action, we need not examine the question as to whether the complaint stated sufficient facts.

There was no error in the sustaining of the demurrer to the complaint.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

ZOLLARS, J., did not participate in the decision of this case.

Filed March 14, 1884.

No. 10,194.

94 208
127 440

HANSHER v. HANSHEW ET AL.

PRACTICE.—*Motion in Arrest.—When Made.*—A motion in arrest must be made *before* the rendition of judgment; otherwise it comes too late to present any question.

SAME.—*Motion by Plaintiff.—Sufficiency of Complaint.*—A motion in arrest of judgment calls in question the sufficiency of the complaint, after verdict; and where the only issue for trial was formed by a general denial of the complaint, and the finding or verdict was for the defendant, the plaintiff's motion in arrest of judgment will present no question for decision.

SAME.—*Record.—Bill of Exceptions.—Supreme Court.*—Under the civil code of 1852, where time was given beyond the term in which to file a bill of exceptions, unless the record affirmatively showed such filing within the time given, the bill could not be considered a part of the record by the Supreme Court.

From the Tipton Circuit Court.

J. Jones, for appellant.

R. B. Beauchamp and *G. H. Gifford*, for appellees.

HOWK, C. J.—This was a suit by the appellant, Hansher, against the appellees Hanshew and Daugherty, upon a complaint and supplemental complaint. The issues joined in the cause by the appellees' joint answer by a general denial were tried by a jury, and a verdict was returned for the appellees, and judgment was rendered accordingly.

In this court the first error assigned by the appellant is the overruling of his motion in arrest of judgment. The record shows that this motion was not made by the appellant until after the trial court had rendered its judgment. The motion, therefore, came too late, and no question is thereby presented for the decision of this court. Buskirk Pr., p. 264, *et seq.*; *Smith* v. *Dodds*, 35 Ind. 452; *Brownlee* v. *Hare*, 64 Ind. 311.

The only other error assigned by the appellant is the overruling of his motion for a new trial. In this motion the only causes assigned for a new trial were, that the verdict of the jury was contrary to law and was not sustained by sufficient evidence. Manifestly, these causes for a new trial can not be considered, and will present no question for our decision, if it be true, as appellees' counsel claim, that the bill of exceptions containing the evidence is not a part of the record. It is shown by the transcript that on May 20th, 1881, sixty days were given the plaintiff in which to file his bill of exceptions, and that such bill was not filed until the 24th day of July, 1881, or until five days after the expiration of the time given. These proceedings were had while the civil code of 1852 was still in full force. Under that code, it was settled by the decisions of this court, that where time was given extending beyond the term, in which to prepare and file a bill of exceptions, the record must affirmatively show that the bill was not only signed but filed within the time limited, or

it will not constitute a part of the record. Buskirk Pr., p. 144; *Toledo, etc., R. W. Co.* v. *Howes*, 68 Ind. 458; *Dunn* v. *Hubble*, 81 Ind. 489.

In the case at bar, it must be held, therefore, that the bill of exceptions is not a part of the record.

The judgment is affirmed, with costs.

Filed Nov. 24, 1883.

ON PETITION FOR A REHEARING.

HOWK, C. J.—The appellant asks a rehearing of this cause upon the ground that we erred in holding that the motion in arrest of judgment, having been made after the rendition of judgment, came too late, and therefore presented no question for our decision. It is claimed that we mistook the record on this point, but in this we think appellant is mistaken. If, however, we were in error, it is certain that a rehearing would be of no service to the appellant. A motion in arrest calls in question the sufficiency of the complaint after verdict. In this case the appellant was the plaintiff below, and if we were to hold his complaint bad that would only be another reason for affirming the judgment. But where, as in this case, the only issue for trial is formed by an answer in general denial of the complaint, and the finding or verdict is for the defendant, the plaintiff's motion in arrest, even if made at the proper time, will present no question for the decision either of the circuit court or of this court.

We have shown conclusively, in the principal opinion, that the bill of exceptions was not filed within the time given by the court beyond the term, and was therefore no part of the record.

The petition for a rehearing is overruled, with costs.

Filed March 15, 1884.

No. 10,347.

ROBINSON ET AL. v. GLASS.

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124 185
126 458
94 211
136 678
94 211
141 61
94 211
152 131
94 211
154 193
94 211
165 87

CONTINUANCE.—*Diligence.—Procuring Evidence.*—An affidavit for a continuance on account of the absence of a witness must show due diligence to procure his testimony, and that there is a reasonable probability that it can be procured if a continuance is granted.

CONTRACT.—*Negligence in Making.*—Where one of sound mind neglects to exercise ordinary prudence in the making of a contract, courts will not grant relief therefrom.

SAME.—*Neglect to Read Contract.*—It is, as a general rule, negligence on the part of one who can read but does not read an instrument which he executes, or if, being unable to read, he fails to exercise ordinary prudence in requiring the instrument to be read to him; *aliter*, if any trick or artifice is resorted to which prevents an opportunity for so doing.

MORTGAGE.—*Negligence in Execution.—Fraud.*—One who executes a mortgage without knowing its contents will not, unless prevented by artifice or trick for which the mortgagee is responsible, be relieved because its contents were not as the latter represented them, there being no relation of trust or confidence between the parties.

SAME.—*Agent.*—The employment of a trusted kinsman and friend or an agent of the mortgagor to misrepresent the contents of a mortgage, whereby its execution is obtained without reading, is a fraud against which relief will be granted.

SAME.—*Consideration. — Judgment. — Payment. — Attorney's Fees. — Collateral Attack.*—A mortgage executed in payment of a judgment, held by the mortgagee against the mortgagor, is founded on a valuable consideration, and satisfies the judgment, nor can the allowance in the judgment of a sum for attorney's fees be questioned in a suit to foreclose the mortgage.

PRACTICE.—*Evidence.—Conflict.—Erroneous Instructions.—Harmless Error.*—The fact that a verdict seems to be strongly sustained by the evidence will not prevent a reversal for erroneous instructions, if there be a conflict of evidence.

STATUTE OF LIMITATIONS.—*Defences to Actions.*—Pure defences are not barred by the statute of limitations.

From the Clark Circuit Court.

C. L. Jewett, for appellants.

A. Dowling and *J. K. Marsh*, for appellee.

ELLIOTT, J.—The rule has long prevailed that to make available an erroneous refusal to continue a cause, the refusal must be assigned as a reason for a new trial. *Kent* v. *Law-*

son, 12 Ind. 675; *Bratton* v. *Bratton*, 79 Ind. 588; *Swan* v. *Clark*, 80 Ind. 57; *Continental L. Ins. Co.* v. *Kessler*, 84 Ind. 310. It has also been long settled that it is not proper to assign as error matters properly embraced by the causes stated in the motion for a new trial.

The question of the correctness of the ruling denying a continuance is, in this case, properly raised by the second specification in the assignment of errors, which is based on the ruling denying a new trial. We are satisfied that there was no error in overruling the motion for a continuance, and for this conclusion deem it only necessary to assign two reasons: 1st. There was not shown that diligence which the law requires of parties. 2d. It was not made to appear that there was any probability of obtaining the testimony of the person named in the application.

The controverted question in the case was whether the mortgage set forth in the appellee's complaint was obtained by fraudulent representations as to the property it covered and the amount of money it secured.

It is the law that one of sound mind must exercise prudence in making contracts, and if he neglects to exercise ordinary prudence, the courts will give him no relief. *Seeright* v. *Fletcher*, 6 Blackf. 380; *May* v. *Johnson*, 3 Ind. 449; *Rogers* v. *Place*, 29 Ind. 577; *Craig* v. *Hobbs*, 44 Ind. 363; *Bacon* v. *Markley*, 46 Ind. 116; *Nebeker* v. *Cutsinger*, 48 Ind. 436; *American Ins. Co.* v. *McWhorter*, 78 Ind. 136; *Williams* v. *Stoll*, 79 Ind. 80 (41 Am. R. 604); *Baldwin* v. *Barrows*, 86 Ind. 351. In *Gatling* v. *Newell*, 9 Ind. 572, it was said, in speaking of parties dealing upon an equal footing, that "The law will not relieve a man, thus circumstanced, for voluntarily neglecting to use common sense and judgment, if he has them."

A man who can read and does not read an instrument which he signs is, as a general rule, guilty of negligence, and so he is, if, being unable to read, he neglects to exercise ordinary prudence in requiring the instrument to be read to him. This is held in nearly all of the cases already cited,

and also in the cases of *Clodfelter* v. *Hulett*, 72 Ind. 137; *Dutton* v. *Clapper*, 53 Ind. 276. If any trick or artifice is resorted to which denies the person executing the instrument an opportunity of reading the instrument, or of having it read to him, the general rule does not operate.

The second instruction given by the court asserts the law substantially as we have stated it, and adds: "But what would be common prudence with one person might not be with another. The infirmity of age and of mind may be taken into consideration, where an effort has been made to deceive, in determining whether or not the person claimed to have been deceived exercised common prudence, such as persons similarly situated would ordinarily exercise under like circumstances. If such prudence is not exercised, there is no legal fraud; if exercised, and the person is deceived, then there is such fraud as the law will relieve from." It is clear to our minds that the appellants were given no reason to complain by this instruction.

Where a party has himself acted in good faith, and has yielded the person with whom he contracts just value for a mortgage, the fraud of a third person, not shared by the mortgagee, can not destroy the validity of the mortgage. 1 Whart. Cont., section 247.

The rule that contracting parties must exercise ordinary prudence in conducting negotiations and executing instruments is not, as counsel for appellees contend, confined to cases where the rights of third persons have intervened. Many of the cases we have already cited prove that the rule prevails where the controversy is between the immediate parties, and an examination of the text-books will show this to be true, and show also that it is so even in equity, as well as at law. 2 Pomeroy Eq., section 893; 2 Kent Com. 485. Judge Story said: "Courts of equity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion." 1 Story Eq., section 200, *a*.

It was proper to direct the jury that if the mortgages were executed in payment of judgments owned by the mortgagee, it operated as a satisfaction of them. Judgments may be satisfied by the acceptance of a mortgage, and the release of a judgment is a valuable consideration.

Attorneys' fees allowed upon a claim duly reduced to judgment can not be brought into question in a subsequent collateral suit.

We think the instructions upon the two propositions last stated were relevant to the case made by the evidence, and that they are not subject to the objections urged against them.

We have stated the general rule to be that one who signs an instrument must read it, or have it read to him, and have said that the rule does not operate where a trick or artifice is resorted to for the purpose of preventing the person from reading the instrument. We are now to consider what may be deemed such a trick or artifice. Ordinarily, one contracting party has no right to rely upon the statements of the other as to the character or contents of a written instrument (this, indeed, is only another form of stating the general rule); but while this is true, it is also true that if a known trust and confidence is reposed in the person making the representations, and there is a relationship justifying such trust and confidence, then the person to whom the representations are made may rely upon them. *Shaeffer* v. *Sleade*, 7 Blackf. 178; *Peter* v. *Wright*, 6 Ind. 183; *Bischof* v. *Coffelt*, 6 Ind. 23; *Matlock* v. *Todd*, 19 Ind. 130; *Worley* v. *Moore*, 77 Ind. 567; 2 Parsons Cont. (7th ed.) 774. One who occupies the position of an agent, or any like position, is required, in all negotiations and contracts, to state all matters within his knowledge fully and truly to his principal, and to make no statements that are not true in every material particular. 1 Whart. Cont., section 254, auth. n. It follows from this that the principal may, without inquiry or investigation, rely on the statements of the agent, or confidential adviser, as to the contents of a written instrument which is presented for signature by a third person, to

whom the agent or confidential adviser should, if faithful to his trust, occupy an adverse relation.

It can not be doubted that the man is guilty of fraud who knowingly procures an agent, or a person trusted and confided in as a kinsman and friend, to falsely represent the contents of a writing, and thus prevents its being read by the person whose adviser and kinsman has been employed to betray him. This is such a trick or artifice as not only excuses the reading of the instrument, but condemns the whole transaction as corrupt and fraudulent.

Tested by these rules, the first instruction asked by the appellants states the law correctly, and should have been given.

We agree with appellee's counsel that if instructions asked are substantially and fairly covered by those given, there is no error; but we think the instructions in this case do not cover that asked by the appellants; on the contrary, one of them asserts a different doctrine, for, in the latter part of the third instruction, it is affirmed that although the appellants' son and agent deceived them, and the deception was practiced pursuant to a conspiracy between him and the appellee, the defence could not succeed unless, to borrow a phrase from the instruction, "the old people exercised common prudence before executing the mortgage." If a fraudulent conspiracy was formed, and its purpose was to seduce the agent into a betrayal of trust, and he did betray it by falsely representing the character and contents of the instrument, the defence was completely made out, and the question of whether the mortgagors did or did not read the mortgage ceased to be of importance.

It is urged by appellee that, even if there is error in the instruction, the verdict and judgment are so clearly right on the evidence that there should be no reversal. We have read the evidence with care, and find that it is strongly in favor of the appellee, but we can not decide that it is so clearly so as to permit us to pronounce the result reached right, notwithstanding the error in the instruction. It is only where the evidence clearly and convincingly makes it appear that a right

result was reached that we can disregard material errors in the instructions. We can not, where there is, as here, sharp conflict in the evidence, pronounce upon the credibility of witnesses and affirm the judgment on the evidence, notwithstanding the jury were misdirected as to the law.

In the argument on the assignment of cross errors, it is contended that, as the mortgage was executed more than six years before the suit was instituted and the defence of fraud interposed, the rights of the appellants are barred by the statute of limitations. This position is untenable. Actions are barred but defences are not. A person who is sued upon a contract may show that it was procured by fraud, although more than six years elapsed before the action on the contract was instituted and the defence interposed. We speak now of pure defences, and not as to matters which may be relied upon as forming a foundation for a counter-claim or cross complaint. The cases of *Sidener* v. *Galbraith*, 63 Ind. 89, *Pilcher* v. *Flinn*, 30 Ind. 202, and *Gray* v. *Stiver*, 24 Ind. 174, apply to actions, not to defences.

Judgment reversed.

Filed March 15, 1884.

No. 10,952.

WHITEWATER RAILROAD COMPANY *v.* BRIDGETT.

JURISDICTION.—*Demurrer.*—A demurrer to a complaint for want of sufficient facts presents no question as to the jurisdiction of the court.

RAILROADS.—*Killing Stock.—Fences.—Cattle-Guards.*—An instruction, that if an animal enter upon the track of a railroad from a highway by reason of insufficient cattle-guards, the company is by statute made liable for injury to the animal received from the locomotives or cars, is not objectionable.

PRACTICE.—*Harmless Error.—Instructions.—Special Interrogatories.*—Where it appears by the answers of the jury to special interrogatories, that an erroneous instruction did not influence the verdict, the error is not available.

From the Wayne Circuit Court.

C. C. Binkley and *W. C. Frazer*, for appellant.
J. H. Kibbey, for appellee.

BICKNELL, C. C.—The appellant brought this suit against the appellee to recover the value of a bay mare. The defendant demurred to each of the paragraphs of the complaint for want of facts sufficient to constitute a cause of action. The demurrers were overruled, and these rulings are assigned as errors. The points made are that neither of the paragraphs alleges that the mare was killed in the county of Wayne, in which the suit was brought. Such a defect, although good ground for a demurrer for want of jurisdiction, is not available upon a demurrer for want of facts sufficient. *Toledo, etc., R. W. Co.* v. *Milligan*, 52 Ind. 505. Causes of demurrer must conform to the specifications of the statute. A demurrer assigning for cause want of sufficient facts presents no question as to the jurisdiction of the court over the subject-matter. *Toledo, etc., R. W. Co.* v. *Milligan*, 52 Ind. 512, and see R. S. 1881, section 343. There was no error in overruling the demurrers.

The defendant answered in two paragraphs, to wit: 1. The general denial. 2. That the plaintiff's mare entered upon the railroad at a public crossing, and was there killed, where the same could not be lawfully fenced. The plaintiff replied in denial. The issues were tried by a jury, who found for the plaintiff, with $100 damages. With their verdict they answered interrogatories as follows:

1. "Did the mare enter upon the railroad track at a public highway crossing? Ans. No."

2. "For fifty feet on each side of the public road crossing, where the mare is said to have been struck by the defendant's locomotive and cars, and where the wagon road and railroad run alongside of each other, could the defendant fence its track without obstructing the public highway? Ans. Yes."

Judgment was rendered on the verdict. The defendant's

motion for a new trial was overruled, and this appeal was taken.

Two of the errors assigned have been considered. The third is overruling the motion for a new trial. There were seven reasons for a new trial, but none of them are discussed in the appellant's brief except the following, to wit:

2. The verdict is not sustained by sufficient evidence.

3. The verdict is contrary to law.

4. The court erred in giving the jury instruction No. 2.

This instruction was: "It is the duty of all railroads in this State to maintain cattle-guards at the crossings of all highways, and if an animal comes upon the track of a railroad from a highway because of insufficient cattle-guards, the railroad is liable for all injuries to such animal received from its locomotives or cars while so on the track."

This charge was in accordance with the law of Indiana as declared by this court. *New Albany, etc., R. R. Co.* v. *Pace*, 13 Ind. 411; *Indianapolis, etc., R. R. Co.* v. *Irish*, 26 Ind. 268; *Indianapolis, etc., R. R. Co.* v. *Kibby*, 28 Ind. 479; *Pittsburgh, etc., R. R. Co.* v. *Ehrhart*, 36 Ind. 118; *Indianapolis, etc., R. R. Co.* v. *Bonnell*, 42 Ind. 539; *Pittsburgh, etc., R. W. Co.* v. *Eby*, 55 Ind. 567; *Evansville, etc., R. R. Co.* v. *Barbee*, 74 Ind. 169; *Grand Rapids, etc., R. R. Co.* v. *Jones*, 81 Ind. 523.

There was evidence to which the foregoing instruction was applicable; as a general statement of the law it was correct; if the appellant supposed that there was some exception thereto proper to be presented to the jury, he should have requested an instruction embracing such exception. *Fulwider* v. *Ingels*, 87 Ind. 414; *Reissner* v. *Oxley*, 80 Ind. 580. But if the instruction were erroneous, it would have been harmless, because the jury, in their answers to the interrogatories, found that the mare did not enter upon the railroad track at the highway crossing, and that for fifty feet on each side of the highway crossing, where the railroad and the wagon road run side by side, the appellant could have fenced

its track without obstructing the public highway. There was no objection to the answers to the interrogatories.

The other reasons for a new trial mentioned in the appellant's brief are, that the verdict was not sustained by sufficient evidence and was contrary to law. The appellant claims that there was not sufficient evidence that the mare was struck by the appellant's train of cars, nor that the injury occurred in the county of Wayne. But there was evidence tending to support the verdict in both these particulars. The case, in some of its features, strongly resembles *Indianapolis, etc., R. R. Co.* v. *Bonnell, supra.* It is not necessary, in such a case, to show, by direct evidence, that the stock was struck by the company's train; it is sufficient if there are circumstances from which that fact may be fairly and justly inferred. *Indianapolis, etc., R. W. Co.* v. *Thomas*, 84 Ind. 194. And the same rule prevails as to proof of the county in which the animal was killed. *Louisville, etc., R. W. Co.* v. *Kious*, 82 Ind. 357. There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed March 14, 1884.

No. 11,395.

GARBER ET AL. *v.* THE STATE.

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149 406
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168 621

CRIMINAL LAW.—*Larceny.—Indictment.*—An indictment for the larceny of "divers goods and chattels of G. G., to wit," enumerating the goods, sufficiently charges the ownership of the goods.

PRESUMPTION.—*Age.*—In the absence of evidence the presumption is that a person is an adult.

INSTRUCTIONS.—An instruction is not erroneous merely because it does not give all the law connected with the matter to which it relates.

From the Clinton Circuit Court.

A. E. Paige and *S. O. Bayless*, for appellants.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, J.—The appellants Sarah H. Garber and Annie Lambert were, at the November term, 1883, of the court below, indicted, tried and, by a jury, found guilty of petit larceny, and, a new trial being refused, they were, in accordance with the verdict, adjudged to pay a fine of one dollar each, and to be imprisoned in the penal department of the Indiana Reformatory Institution for Women and Girls for the term of one year.

Error is assigned upon the alleged insufficiency of the indictment, and upon the refusal of the court to grant a new trial.

The indictment charged "that Sarah H. Garber and Annie Lambert, on the 30th day of October, 1883, at said county of Clinton and State of Indiana, did then and there unlawfully and feloniously steal, take and carry away divers goods and chattels of one Gottlieb Gatz, to wit: Eighteen yards of lace, of the value of $2.25," and other enumerated articles of merchandise, all "being then and there of the aggregate value of $9.25."

The only objection urged to the indictment is that it does not charge in direct terms that the articles taken were the property of Gatz, and that in respect to the ownership of the property the indictment is too uncertain.

In the respect complained of, the indictment is substantially in the usual form, and is, consequently, sufficient. *King* v. *State*, 44 Ind. 285; Bicknell Crim. Pr. 324; Indiana Crim. L. 76; Moore Crim. L., p. 895.

It is insisted that the evidence did not show Mrs. Garber to be over fifteen years old, and that on that account the verdict was not sustained by sufficient evidence.

In the first place, no question seems to have been directly made at the trial upon the ages of the appellants, and in the

absence of any evidence on the subject, the presumption would have been that both were adults. *Palmer* v. *Wright*, 58 Ind. 486. It, however, came out at the trial that Mrs. Garber had a son then eight years old, and that circumstance was, we think, quite sufficient to raise the presumption that she was over fifteen years old.

It is lastly complained that the court erred in giving instruction known as No. 1, on its own motion.

That instruction set out literally sections 1934, 6176 and 6177, R. S. 1881, merely adding, "And said Reformatory Institution is now open for the reception of prisoners."

The objection made to this instruction is that the court did not copy and read in connection with it section 6179 of the same statutes; that the omission to call the attention of the jury to this last named section had the effect of sending the cause to them without full instructions as to the law governing every phase of it, and that hence the omission was injurious to the appellants.

The objection that an instruction did not contain as much as it might have included, is not, ordinarily, an available objection in this court. If the court fails to instruct the jury in some material respect, it is the duty of the party feeling himself aggrieved to ask an instruction covering the omitted point, and in case of refusal to reserve his exceptions. *Adams* v. *State*, 65 Ind. 565; *Reissner* v. *Oxley*, 80 Ind. 580; *Dyer* v. *Dyer*, 87 Ind. 13.

In this case the instruction complained of stated the law correctly so far as it assumed to state it, and was applicable to the evidence. It can not, therefore, be held to have been, in any respect, an erroneous instruction.

The judgment is affirmed, with costs.

Filed March 25, 1884.

No. 11,100.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. SKELTON.

RAILROADS.—*Killing Stock of Employee.—Negligence.—Fencing.*—To a complaint under the statute for killing the plaintiff's mare, the road not being fenced, etc., it was answered: 1. That the plaintiff was the defendant's servant; that as such it was his duty to keep the railroad track, near a certain station, free from trespassing animals; that, in violation of such duty, he turned his mare out at such a place, near which the track was not fenced, whereby, etc. 2. That a certain station was a public place, with side-tracks and switches where large shipments of goods were made and received, and that plaintiff turned his mare loose in that immediate vicinity, and she went upon the track at a place where it was not securely fenced, etc.

Held, that both paragraphs were bad on demurrer; the first, for not averring that at the place where the animal entered upon the track and was killed, the employee was required by contract to keep off trespassing animals, and the second, for failure to show that the animal was killed at the station, where no fence was required.

From the Washington Circuit Court.

D. M. Alspaugh and *J. C. Lawler*, for appellant.

S. B. Voyles and *H. Morris*, for appellee.

HAMMOND, J.—Action to recover for the value of a mare killed upon the appellant's railroad at a place where it was not securely fenced. Answer in three paragraphs, to the second and third of which the appellee's demurrer was sustained for want of facts.

Trial by the court; finding and judgment for the appellee. Errors are assigned that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in sustaining the demurrer to the second and third paragraphs of the appellant's answer. No objection is urged to the complaint in the appellant's brief, and we discover no defect in it. The second and third paragraphs of the answer are as follows:

"2. For further answer to the complaint, said defendant says that at the time the said mare was killed by the engines

and cars as alleged, the said plaintiff was in the employ of the defendant, and was the agent and servant of the defendant, and that said agent's place of business and duty as such servant and employee were at and in the vicinity of defendant's depot at Farrabee's Station, on said railway, in said county; that as such agent and servant it was the duty of plaintiff to oversee and keep the defendant's railway and switches at and near said station free of all obstructions and trespassing animals, and to save the defendant and the travelling public, in so far as he could, from accident and loss by reason of such obstructions and trespassing animals; that said plaintiff, in violation of his said duty as such agent and servant, and well knowing the premises, and the danger to other employees of said company and to passengers travelling on the cars of said company, did knowingly and wilfully turn his said mare loose in the immediate vicinity of defendant's said railway track at a place where the same was not securely fenced in, and negligently and carelessly permitted his said mare to wander and go upon said railway, where she was killed. Wherefore defendant demands judgment.

"3. Defendant for further answer says that plaintiff's said mare was killed, as alleged, in the immediate vicinity of Farrabee's Station on defendant's said railway; that said station is a public place; that large lots of goods, lumber and merchandise are shipped by defendant's cars to and from said station; that said defendant has side-tracks and switches there, and that such tracks and switches are necessary for the transaction of the defendant's business at said station; that the plaintiff resides at said station and has resided there for more than ten years last past, and has during said time been in the employ of said company at said point, and at and long before the killing of said mare was familiar with the running of the trains over said road, and knew the time when said trains were to arrive and depart from said station; but, notwithstanding the knowledge of said plaintiff in regard to said facts, he turned his mare loose in the immediate vicinity

of said station, and at a point along and near said railway where the same was not securely fenced in, and negligently and carelessly permitted her to wander and go upon the track of said railway, at or near said station, where she was killed. Wherefore defendant prays judgment."

In an action against a railroad company for killing stock where its road is not securely fenced, it is no defence to the action that the plaintiff's negligence contributed to the injury. *Louisville, etc., R. W. Co.* v. *Whitesell*, 68 Ind. 297. The fact, therefore, that the appellee's negligence in turning his mare loose near the railway track resulted in her going upon the road where she was killed, does not prevent a recovery in his favor.

It has been held by this court that where, by contract with a railroad company, the owner of land through which it passes has undertaken to maintain a fence, no recovery can be had by him for an injury to his animal resulting from his failure to perform his contract, without proof that the company was guilty of negligence. *Terre Haute, etc., R. R. Co.* v. *Smith*, 16 Ind 102; *Indianapolis, etc., R. R. Co.* v. *Shimer*, 17 Ind. 295; *Indianapolis, etc., R. R. Co.* v. *Petty*, 25 Ind. 413. It would seem, from the principle announced in the above cases, that if it is the duty of an employee, by virtue of his contract with a railroad company, to keep trespassing animals off a certain part of the railway track, he ought not to recover for an injury to his own animal occurring through his failure to comply with his agreement. But the second paragraph of appellant's answer, in which such a contract with the appellee is attempted to be set up, fails to aver that the appellee's mare entered and was killed upon that part of the track where his contract required him to keep off trespassing animals. It is charged that he turned his mare loose in violation of his duty. But this is a mere conclusion. The facts out of which the duty arose should have been stated, showing how and in what respect the act upon his part complained of conflicted with the terms of his employment.

The facts stated in the third paragraph of the answer were sufficient to show that the appellant was excusable for not fencing its road at Farrabee's Station; but the averments that the appellee turned his mare loose in the immediate vicinity of that station, and carelessly and negligently permitted her to wander and go upon the track of the railroad at or near said station, where she was killed, do not show that the injury occurred at said station where the appellant was not required to fence its road. Besides, the appellant might have shown, under its general denial, that it was not legally bound to fence its road where the animal entered upon the track and was killed. The error, therefore, in any event, of sustaining a demurrer to the third paragraph of the answer, was harmless. *Jeffersonville, etc., R. R. Co.* v. *Lyon*, 55 Ind. 477.

The demurrers to the second and third paragraphs of the answer were rightly sustained.

Affirmed, with costs.

Filed March 15, 1884.

No. 11,236.

WALTMAN v. RUND ET AL.

NUISANCE.—*Complaint for Damages for Obstructing Street.—Nominal Damages.—Harmless Error.*—In an action by a lot owner, against an adjoining proprietor, for damages resulting from an obstruction alleged to have been placed by the defendant in a public street used by the plaintiff, and to abate the alleged obstruction, the complaint should allege special injury to the plaintiff, beyond facts showing merely nominal damages; and, in such an action, the sustaining of a demurrer for insufficiency to a complaint showing merely nominal damages is not available error in the Supreme Court.

From the Brown Circuit Court.

G. W. Cooper, *C. B. Cooper* and *W. M. Waltman*, for appellant.

W. R. Harrison, *W. E. McCord* and *R. L. Coffey*, for appellees.

BLACK, C.—A demurrer to the complaint of the appellant against the appellees, for want of sufficient facts, was sustained.

The complaint showed that the appellant was the owner of certain lots and parts of lots in block six, of the town of Georgetown, Brown county, in this State, some of said lots and parts of lots being bounded on the west by a certain street known as Western Border street, thirty-six feet wide, running north and south the entire length of said town, and all of them being adjacent to certain alleys which intersected said block; also, that he was the owner of the lands west of and adjoining said street, and that he had a grist-mill which he operated at a certain distance south of said block and west of said street; also, that he was the owner of the lands on the north and northwest of said block, and that at a certain distance northwest of said block he had erected a barn, which he was using and occupying; that at a certain distance north of said block his dwelling-house and out-buildings were situated, where he resided; and that he had a dwelling-house on a certain one of said lots, which he rented by the year.

It was alleged that the appellees were the owners and in the possession of a certain lot and parts of certain lots in said block, south of and adjoining the appellant's said lots and parts of lots, said property of the appellees extending across said block and being the southern portion thereof, and being intersected north and south by one of said alleys, and being bordered on the west by said Western Border street, and on the south by another street forty feet wide, running across the entire width of said town.

It was then alleged that the appellees built a fence on, along and across the alley, so dividing their property, and that they built a fence on, along and across said Western Border street, on the west side of their said property and on the east of the appellant's lands adjoining said Western Border street; "whereby the comfort of the plaintiff has been disturbed, and an obstruction to the free use of plaintiff's property, so

as essentially to interfere with the comfortable enjoyment of life and his property; whereby the plaintiff says said fence became and was and is a nuisance, and whereby the plaintiff is damaged $100. Wherefore the plaintiff demands judgment for $60, that said nuisance be abated, that defendants be enjoined from the maintenance thereof, and that the plaintiff may have all other proper relief."

Assuming, without deciding, that the complaint showed a violation by the defendants of a legal right of the plaintiff, in relation to his property, it did not show by the allegation of facts that he had suffered more than nominal damages, and did not show any prospective injury.

In an action for damages because of a public nuisance, or in a suit to prevent its establishment or maintenance, the plaintiff must show his special injury, and only such special damage can be proved as has been pleaded. The showing of the mere violation of a legal right by the creation of such a nuisance, without any showing of how damages arise therefrom, can entitle the plaintiff to no more than a nominal amount; and, to invoke the preventive remedy, substantial prospective injury must be alleged. 1 Sutherland Dam. 765, 766; High Inj., section 762; *White* v. *Flannigain*, 1 Md. 525; *Haynes* v. *Thomas*, 7 Ind. 38; *Powell* v. *Bunger*, 91 Ind. 64; *Murphy* v. *Evans*, 11 Ind. 517.

It was not here shown that the plaintiff had been or would be hindered in the use of the public easement, or that ingress to or egress from his real estate had been or would be prevented, or that the value of his property was or would be depreciated. If the plaintiff showed the violation of a right, he did not by allegation of facts show in what particular respect his comfort had been disturbed, or how the free use of his property, "so as essentially to interfere with the comfortable enjoyment of life and his property," had been obstructed, and he did not allege any threatened or purposed future injury.

Sustaining a demurrer to a complaint which only shows a right to recover nominal damages is not available error.

The judgment should be affirmed.

PER CURIAM.—It is ordered, on the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed March 27, 1884.

94, 228
129 87
94 228
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137 652
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No. 9039.

DOWNIE v. BUENNAGEL.

WILL.—*Rule for Construction.—Testator's Intention.*—The intention of the testator is to be ascertained, in construing the provisions of his will, and, if possible, carried into effect. This is the primary rule in the interpretation of a will, and, for the purpose of ascertaining the testator's intention, all the provisions of the will relating to the subject of the inquiry should be construed together.

SAME.—*Devise of Life-Estate.—Power to Sell and Convey in Fee.—Execution of Power.—Warranty Deed.—Consideration.*—By his last will and testament, which was duly admitted to probate, A. G. S. gave and devised all his estate, real and personal, to his mother, M. E. D., "to hold and enjoy the same during her life, with full power to sell the same, or any part thereof, and appropriate the proceeds to her own use and benefit; and all deeds and conveyances of real estate, by her made, shall pass a title in fee to the purchaser, it being my will that she shall enjoy the same as though it were devised to her in fee." In the second item of his will, the testator further said: "After the death of my mother, I devise all of the said estate to my half brother, Charles Lindley Downie." Afterwards, on November 18th, 1874, the testator's mother, M. E. D., by her deed of that date, sold, conveyed and warranted a part of the real estate so devised to her to the defendant C. B., who paid her therefor the full consideration and value of the fee simple thereof, and accepted her deed as conveying to and vesting in him the fee of the real estate described therein, and took and held possession thereof, making valuable and lasting improvement thereon. Upon the foregoing facts, *Held*, that in the execution of such warranty deed as aforesaid, the devisee, M. E. D., manifestly intended to execute the power of disposition conferred on her by the testator's will, and that, by such deed, she conveyed to the defendant C. B., not merely her life-estate in the real estate, described in the deed, but also the absolute title in fee simple in and to such real estate, which she had "full power" to do, under the will.

SAME.—*Declaratory Deed.—Evidence.—Practice.*—On the trial, the court admitted in evidence, over the plaintiff's objections, a deed executed by the devisee, M. E. D., on September 25th, 1875, wherein she declared, among other things, that it was her purpose and intention, in the execution of her previous deed to the defendant C. B., to convey to him the real estate therein described in fee simple, in execution of the power conferred on her by the testator's will.

Held, that there was no error in the admission of such deed in evidence.

From the Superior Court of Marion County.

W. W. Herod, F. Winter and *O. T. Boaz*, for appellant.

J. Hanna, F. Knefler, J. S. Berryhill, B. Harrison, C. C. Hines and *W. H. H. Miller*, for appellee.

HOWK, C. J.—By a proper assignment of error here the appellant, the plaintiff below, has brought before this court the same errors assigned by him in general term, in this cause, which were in substance as follows:

1. The overruling of his demurrer to the second paragraph of appellee's answer;

2. Error of the court in its conclusion of law upon its special finding of facts; and,

3. The overruling of appellant's motion for a new trial.

The facts found by the court at special term, in its special finding, are substantially the same as those alleged by the appellee in the second paragraph of his answer, and these facts are fully sustained by the evidence appearing in the record.

The action was brought by the appellant to recover the possession of certain described real estate in the city of Indianapolis. Of this real estate the appellant claimed that he was the owner in fee simple and lawfully entitled to the possession; while the appellee claimed that he held the title thereto in fee simple and was lawfully in the possession thereof. Each of the parties claimed to derive his title to such real estate from the same common source.

The facts of the case are uncontroverted, and may be stated briefly as follows: In 1870, one Alanson G. Stevens died testate in Marion county, and seized in fee simple of the real

estate in controversy. Afterwards, on the 18th day of June, 1870, the last will and testament of Alanson G. Stevens, deceased, bearing date on the 14th day of January, 1868, was duly admitted to probate by and before the clerk of the court of common pleas of Marion county, and recorded in the proper record of wills of such court and county. Of this last will and testament we set out so much as has any bearing upon the title to the real estate in controversy, as follows:

"*Item.* I give and devise to my beloved mother, Melissa E. Downie, all my property and estate, both real and personal, to hold and enjoy the same during her life, with full power to sell the same, or any part thereof, and appropriate the proceeds to her own use and benefit; and all deeds and conveyances of real estate, by her made, shall pass a title in fee to the purchaser; it being my will that she shall enjoy the same as though it were devised to her in fee. Should my mother die first, then and in that case, I devise all the remainder of my estate to Charles Lindley Downie.

"*Item.* After the death of my mother I devise all of the said estate to my half-brother, Charles Lindley Downie, and should he die before attaining the age of twenty-one years, then I will and devise that all of my said estate shall go to the following named persons, in equal portions, that is to say," etc. (Names not material and omitted.)

The testator's mother, Melissa E. Downie, mentioned in the last will and testament of Alanson G. Stevens, deceased, took possession of the real estate in controversy under such will, and she never had at any time any right in or title to or power over such real estate *except* such as she took and had under such last will. The appellant, Charles Lindley Downie, the plaintiff in this suit, is the same person mentioned by that name in said last will and testament, and attained the age of twenty-one years in the lifetime of Melissa E. Downie, and before the commencement of this action. Melissa E. Downey died intestate before this suit was commenced; but, at the time of her death and at all times since,

the appellee was and had been in the exclusive possession of the real estate described in appellant's complaint. After the death of Melissa E. Downie, and after the appellant, Charles Lindley Downie, had attained the age of twenty-one years, but before he commenced this suit, he demanded the possession of the real estate in controversy from the appellee, who refused to surrender such possession.

After the death of Alanson G. Stevens, and the probate and record of his last will and testament, to wit, on the 1st day of July, 1870, Melissa E. Downie, then in full life, executed, acknowledged and delivered an instrument in writing, whereby she nominated, constituted and appointed Thomas Cottrell, of Marion county, her true and lawful attorney, authorizing and empowering him to sell and convey any and all real estate to which she had any title or in which she had any interest, and to execute conveyances and any and all other instruments in her name and behalf. This power of attorney was duly recorded on the day of its date in the recorder's office of Marion county. Afterwards, on the 18th day of November, 1871, Melissa E. Downie, by Thomas Cottrell, her attorney in fact, conveyed and warranted by her deed of that date unto the appellee, Charles Buennagel, the real estate in controversy in this suit for the sum of $665. This deed was duly recorded on November 21st, 1871, in the recorder's office of Marion county. The appellee paid for such real estate the full consideration and value of the fee simple thereof, and accepted his deed as conveying to and vesting in him the fee of such real estate. By virtue of his purchase and deed, immediate possession of such real estate was delivered to and taken by the appellee, claiming to be the owner in fee simple thereof, and in faith of such title he made lasting improvements thereon of the value of $3,000. Afterwards, on the 25th day of September, 1875, Melissa E. Downie, then living, in her own proper person, executed, acknowledged and delivered a deed to Thomas Cottrell, trustee, for the purposes therein mentioned. In this deed it was

recited that Melissa E. Downie had theretofore, "by her several deeds of conveyance duly executed, conveyed in fee simple to the several grantees therein named the respective lands therein mentioned, * * * situate in the city of Indianapolis, Marion county and State of Indiana, and being lands devised to her by the last will and testament of Alanson G. Stevens, which conveyances are as follows:" Setting out a long list of such deeds, giving the names of the grantees therein respectively, the several dates thereof, a brief description of the real estate thereby conveyed, and the deed-book and page where the deeds were respectively recorded, and, among others, describing the deed to the appellee of the real estate in controversy in this suit.

It was further recited in such deed of September 25th, 1875, that as there might be a question as to whether the deeds therein set out conveyed to the grantees therein named a title in fee simple to the real estate in their respective deeds described, and as it was the desire of Melissa E. Downie to avoid any such question; therefore, she thereby declared that it was her intention, in making such deeds, to convey by each of them to her respective grantees a full and absolute title thereto in fee simple, as fully and completely as she was authorized and empowered to convey the same, both by virtue of the express desire to her and the power of sale and appointment vested in her by the last will and testament of Alanson G. Stevens, deceased, which was duly proved and recorded in the clerk's office of Marion county, on the 18th day of June, 1870.

Therefore, the more certainly to carry out her intent, and to invest her grantees therein named or any other such grantees whose names might by oversight have been omitted, or the grantees mediately or immediately of her grantees, with a full, indefeasible and unquestionable title to the lands so conveyed by her, Melissa E. Downie, by her said deed of September 25th, 1875, in consideration of the premises therein recited and of one dollar to her paid by Thomas Cottrell,

the receipt whereof was thereby acknowledged, thereby conveyed and quitclaimed to said Thomas Cottrell all the lands so devised to her, and by her theretofore granted to the several grantees named in such deed, or other grantees, as fully and completely as she might or could convey the same, by virtue of the devise made to her and the power granted to her in and by such last will, in trust for her said several grantees, their heirs and assigns, so as to quiet their respective titles thereto, the sole purpose of such deed being to explain and effectuate the purpose of her aforesaid deeds to her respective grantees.

Upon the foregoing facts the trial court held, and correctly so, we think, that the appellant had no cause of action against the appellee; and that the latter was the absolute owner in fee simple, and lawfully in the possession, of the real estate in controversy. It is true that Melissa E. Downie, under the last will and testament of her deceased son, Alanson G. Stevens, took all his property, real and personal, to hold and enjoy during her life; but it is also true that with her life-estate there was coupled an absolute and unqualified power to dispose of the devised estate, or any part thereof, and an unlimited right to appropriate the proceeds to her own use and benefit. In the execution of the power of disposition conferred on Melissa E. Downie, the testator further provided in his will that "all deeds and conveyances of real estate by her made shall pass a title in fee to the purchaser," and then added that it was his will "she should enjoy the same as though it were devised to her in fee." It was the duty of the court, in construing the testator's will, to ascertain his intention, and, if possible, give effect to such intention, in the matter under consideration. *Tyner* v. *Reese*, 70 Ind. 432; *Lofton* v. *Moore*, 83 Ind. 112; *Hinds* v. *Hinds*, 85 Ind. 312.

It is impossible, as it seems to us, to mistake the testator's intention in conferring upon his mother, Melissa E. Downie, the absolute and unlimited power to dispose of the devised property and estate. It is equally impossible, we think, to

mistake the intention of Melissa E. Downie in the sale and conveyance of the real estate in controversy to the appellee. She conveyed such real estate by a deed of general warranty, purporting to convey the fee to the appellee, who paid therefor the full consideration and value of the fee simple thereof, and accepted his deed as conveying to and vesting in him the fee of such real estate. The testator declared in his will, that any deed and conveyance of real estate by her made should pass a title in fee to the purchaser. We are of opinion, therefore, that the trial court was justified and authorized by the evidence in this case, independent of the deed of Melissa E. Downie, of September 25th, 1875, declaratory of her purpose and intention in making her prior conveyance to the appellee, in finding that she intended, in making such conveyance, to execute the power of disposition conferred on her by the testator's will. It must be held in this case that the deed of Melissa E. Downie, of November 18th, 1871, conveyed to the appellee not merely her life-estate in the real estate described in such deed, but also the fee simple of such real estate, which she had full power to sell and convey under the testator's will. *Clark* v. *Middlesworth*, 82 Ind. 240; *South* v. *South*, 91 Ind. 221, and authorities there cited.

The appellant objected to the admission in evidence of the deed of Melissa E. Downie, bearing date on September 25th, 1875, on the ground that it was "immaterial and irrelevant;" but the objection was overruled, and the deed admitted in evidence. There was no error, we think, in this ruling. The deed in question, as we have seen, was simply declaratory of her purpose and intention to sell and convey, by her prior deed, to the appellee, the real estate in controversy in fee simple, under the power of disposition given her by the testator's will. That such was her purpose and intention in the execution of her prior deed, we think, was sufficiently shown by the other evidence appearing in the record; but we can not regard the deed as either immaterial or irrelevant evidence, and its admission was objected to on no other ground. *Coryell* v.

Dunton, 7 Pa. St. 530; 2 Perry Trusts, section 511 *a*, *b*, and *c*.

In the record of this cause we have found no error requiring the reversal of the judgment.

The judgment is affirmed, with costs.

Filed March 25, 1884.

No. 10,572.

ERWIN *v.* FULK, AUDITOR, ET AL.

HIGHWAY.—*Location of.—County Commissioners.—Order not Fixing Width Void.*—An order by a board of commissioners, locating and directing the opening but not fixing the width of a public highway, is void.

SAME.—*Injunction Against Supervisor.—Trespass.*—A board of commissioners ordered a change in a certain highway, but their order did not fix the width of the new road, and a copy of the order was placed in the hands of a supervisor, to be executed, whereupon the owner of a farm brought suit to enjoin the supervisor from so doing, alleging in his complaint the foregoing facts, and also that the new road would cut his farm into irregular shaped tracts, cut in two his orchard, change the frontage of his buildings and necessitate the construction of much new fence.

Held, on demurrer, that injunction will lie, that the injury alleged in the complaint is not a mere trespass, and that under the provisions of section 1141, R. S. 1881, it is not necessary that the injury contemplated be irreparable, but such only as would produce great harm to the plaintiff during the litigation.

From the Monroe Circuit Court.

G. W. Friedley, *E. D. Pearson*, *H. H. Friedley*, *J. R. East* and *W. H. East*, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellees.

ELLIOTT, J.—The complaint of the appellant alleges that a petition was presented to the board of commissioners of Monroe county praying for a change in a highway therein described; that such proceedings were had as resulted in an order directing the change to be made as prayed; that the change proposed will alter the direction of the highway

through the land of the appellant, so as to divide it into two separate parcels of irregular shape; that it will "require a large amount of additional fencing;" that it will divide into separate parcels "a large bearing orchard;" that if the change is made as proposed, the road will pass on the side or end of his house and barn instead of in front of them as the old road does, and that the change, if made, will destroy his pastures and growing crops. It is also alleged that the order of the board of commissioners is void for the reason, among others, that it does not describe the width of the new highway proposed to be laid out. It is further averred that the road superintendent is in possession of a certified copy of the order of the board, and that the proposed highway "having been ordered to be opened by the board, the superintendent is now threatening to carry out the order of said board and open said highway, but to what width plaintiff is not informed," and that, unless enjoined, he will execute the order of the board and open the highway as directed. A demurrer was sustained to this complaint and the plaintiff appeals.

An injunction will not lie to restrain the execution of an order of the board of commissioners unless the order is void, for the reason that if the proceedings are merely irregular or erroneous, the remedy is by appeal, and, as has been many times decided, where there is such a remedy injunction will not lie. The first question, then, is whether the complaint shows the order to be void, for, if it does not, it is clearly bad. We think it does do this. It was decided in *White* v. *Conover*, 5 Blackf. 462, that an order which does not define the width of the proposed highway is absolutely void. This case has been many times followed and approved. *Carlton* v. *State*, 8 Blackf. 208; *Barnard* v. *Haworth*, 9 Ind. 103; *DeLong* v. *Schimmel*, 58 Ind. 64.

A mere naked trespass can not be enjoined, for the law affords an adequate remedy by an action for damages.

In our opinion the present complaint charges more than an

ordinary trespass, and also shows that the incidental damages are such as can not be fairly made good in money. The act of the person threatening to enter upon the appellant's land is not that of a mere trespasser, but is that of an officer acting under color of authority. The illegal entry threatened is more than that of a trespasser, for it is that of a public officer having an order of an inferior judicial tribunal directing him to enter, and asserting a right to make a permanent appropriation of the plaintiff's land. Looking to analogous cases, we shall find ample authority for holding that the case is one for injunction. A sale of land for a tax assessment may be enjoined although the assessment is utterly void. An entry on land under claim of condemnation for a public use may be enjoined where the proceedings are without validity. A sheriff's sale may be enjoined where the judgment is void. Many more familiar instances might be referred to, but these are sufficient to show that in closely analogous cases courts do not hesitate to grant injunctions. But there are cases identical in principle with the one at bar, in which a threatened entry on land under color of authority has been enjoined. *Winslow* v. *Nayson*, 113 Mass. 411; *Frizell* v. *Rogers*, 82 Ill. 109; *Champion* v. *Sessions*, 1 Nev. 478; *Anderson* v. *Comm'rs*, 12 Ohio St. 635; *McArthur* v. *Kelly*, 5 Ohio, 140; *Floyd* v. *Turner*, 23 Texas, 292. The English cases go much farther than the American cases generally do, and a study of their reasoning has impressed us that they assert the correct doctrine. They will be found collected in Kerr Injunctions, 297, *n.*

The facts stated in the complaint show the threatened wrongful act to be more than a temporary trespass, for they show it to be an act continuous in its nature, permanently affecting the freehold, and sustained by color of authority from a judicial tribunal. The remarks of Judge Story are justly applicable: "For," said this learned judge, "if the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts

of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But, now, there is not the slightest hesitation, if the acts done, or threatened to be done, to the property, would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. If, indeed, courts of equity did not interfere in cases of this sort, there would (as has been truly said) be a great failure of justice." 2 Story Eq., section 928. Mr. Pomeroy discusses the subject thoroughly, and thus states the principle which rules such cases: "The injunction is granted, not merely because the injury is essentially destructive, but because, being continuous or repeated, full compensation for the entire wrong can not be obtained in one action at law for damages." 3 Pomeroy Eq., section 1357. In the case before us the nature of the injury is not only continuous, but by cutting the land into an irregular shape, by severing the orchard into two parcels, and by changing the frontage of the house and barn, an injury is inflicted that can not be fully measured in damages, and it is also an injury affecting the just enjoyment of the property in the future. The proper location of fields and orchards, of houses and barns, may add much to the enjoyment of the owner of the farm, and it would be a denial of justice to refuse to enjoin an officer acting under a void judgment from changing the shape of the orchards and fields and destroying the frontage of the house and barn. Our own cases recognize the rule that in such a case as this injunction is the appropriate remedy. *Ross* v. *Thompson*, 78 Ind. 90; *Kyle* v. *Board, etc.*, *ante*, p. 115; *Heagy* v. *Black*, 90 Ind. 534.

The case of *Smith* v. *Weldon*, 73 Ind. 454, is readily distinguished from the present, for there the complaint showed that the damages could be ascertained, and that they amounted to only $100. The opinion in *Lewis* v. *Rough*, 26 Ind. 398, treats the complaint as charging a simple trespass, and proceeding on that ground holds that the complaint did not warrant an injunction. On the theory assumed, the conclusion

is right, but we doubt whether the complaint in that case was justly construed. The decision in *Bolster* v. *Catterlin*, 10 Ind. 117, proceeds on the theory that the complaint charged a simple trespass. We quote from the opinion: "It is averred that the plaintiff built his house, made improvements, and planted ornamental trees, with a view to the road as opened and fenced; though it is not shown that by its removal the enjoyment or value of his farm would in any degree be impaired. There is, indeed, but one averment upon which the object of the suit can be supposed to rest, viz., 'that the defendant had threatened and intended to remove the road, and with that view had actually commenced removing the fences;' and that, it seems to us, avers simply an intent to commit a naked trespass—one not irreparable, but the subject of full recompense in damages."

The provisions of the code are often lost sight of, and the expressions of the old cases adopted in place of those of the statute. It is not necessary under the provisions of our code to aver or prove irreparable injury. It is sufficient, in the language of the statute, that the plaintiff is entitled to the relief demanded, and that the relief, or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff. R. S. 1881, sec. 1148. In speaking of this provision the court said: "The expression 'great injury' here used, in its ordinary import, certainly does not imply an irreparable injury." *Clark* v. *Jeffersonville, etc., R. R. Co.*, 44 Ind. 248.

The court below erred in sustaining the demurrer to the complaint.

Judgment reversed.

Filed March 26, 1884.

No. 11,232.

94 240
130 506
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146 289

SHARP ET AL. *v.* MOFFITT, ADMINISTRATOR, ET AL.

JUDGMENT.—*Relief From.—Excusable Neglect.—Attorney's Negligence.*—The neglect of an attorney to plead a valid and proper defence, or to attend the trial, either intentionally or through forgetfulness, and his failure for like reasons to notify his client of the time of trial, whereby a judgment is wrongfully obtained against the client, furnishes no ground for relief against the judgment.

SAME.—The inadvertence, mistake or neglect of an attorney affords no ground for relief against a judgment unless it would have been excusable if imputed to the client.

From the Fountain Circuit Court.

A. A. Rice and *M. M. Milford*, for appellants.

I. E. Schoonover, for appellees.

NIBLACK, J.—On the 14th day of February, 1881, Samuel Moffitt commenced an action in the court below against William M. Sharp and Mary A. Sharp, his wife, upon a promissory note payable to the plaintiff, and purporting to have been signed by both of the defendants.

During the progress of the cause Moffitt died, and Daniel L. Moffitt, as his administrator, was substituted as plaintiff.

After summons was served upon the defendants, Mrs. Sharp, through her husband, employed a competent attorney to make a special defence to the action in her behalf. At the proper time this attorney appeared to the action for both of the defendants, and answered in general denial, and payment. Issue being joined, the cause was afterwards tried by the court, and on the 20th day of May, 1881, judgment was rendered against both of the defendants for $505.35, and costs of suit. After the close of the term an execution was issued on the judgment and levied upon a tract of land belonging to Mrs. Sharp, which was advertised to be sold on the 6th day of August, 1881. On the 1st day of this last named month this suit was commenced against the execution plaintiff and Thomas Rinn, the sheriff of Fountain county, to temporarily restrain the

sale of the land and to have the judgment, as against Mrs. Sharp, set aside, and a new trial ordered as to her, upon the ground of inadvertence and excusable neglect on her part.

The complaint charges that when Mrs. Sharp signed the note she was, as she still is, a married woman; that her attorney, when he was employed, was instructed to plead her coverture as a separate and special defence to the action, which he promised to do; that he, said attorney, advised her, through her said husband and agent, that her defence was complete, and that she need have no uneasiness as to the result of the action so far as it might affect her; that her said attorney, upon whom alone she relied in her defence, also promised to notify her of the time at which the cause might be set for trial; that he, said attorney, either purposely, or from gross neglect, or forgetfulness, not only failed to plead her coverture, but failed to notify her of the time of trial, by reason whereof she was not present at the trial and did not learn that the cause had been tried until after the term at which the trial took place had closed; that her said attorney was also not present at the trial, and by reason of his negligence and inattention to the cause, no defence was, in fact, made for her at the trial.

The circuit court sustained a demurrer to the complaint, and the defendants had final judgment upon demurrer. This appeal, consequently, presents only the question of the sufficiency of the complaint.

Freeman on Judgments, at section 112, says: "The neglect of an attorney or agent is uniformly treated as the neglect of the client or principal, except in New York. A default will not be opened because the attorney had prepared a demurrer, but had failed to file it by reason of his miscalculating the time when it was due; neither will relief be granted because the attorney forgot the day and time for trial. And, in general, no mistake, inadvertence, or neglect, attributable to the

attorney, can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client."

Weeks on Attorneys, at section 294, states the rule as to the neglect of attorneys, considered with reference to the other side of a cause, in similar language, and then proceeds: "But usually the rule is, that where an attorney is employed in a cause, the fact that his client is not in fault, and that judgment goes against him through the laches or bad faith of the attorney, will furnish no ground of relief. The acts and omissions of the attorney in such a case are those of the client. The attorney is the agent of the party employing him, and in court stands in his stead. This is the rule, unless there be some fraudulent combination or collusion between the attorney and the other side."

Amongst the many cases cited as sustaining the doctrine announced as above, is the case of *Spaulding* v. *Thompson*, 12 Ind. 477, which has been cited approvingly in the subsequent cases of *Frazier* v. *Williams*, 18 Ind. 416, and *Phelps* v. *Osgood*, 34 Ind. 150. The inexcusable negligence of Mrs. Sharp's attorney being directly charged, and hence conceded, in this case, it must be held that the negligence so charged and conceded was attributable to her, and that she is, consequently, not entitled to the relief demanded by the complaint.

The judgment is affirmed, with costs.

Filed March 26, 1884.

No. 10,560.

HAMILTON ET AL. *v.* BROWNING ET AL.

PLEADING.—*Practice.*—There is no available error in sustaining a demurrer to a special denial, if the general denial be also pleaded.

CHATTEL MORTGAGE.—*Assignment.*—The assignment of a chattel mortgage without the debt secured by it passes no right whatever to the assignee.

REPLEVIN.—*Parties.*—*Verdict.*—*Judgment.*—In a joint suit in replevin, there may be a verdict and judgment for one plaintiff and against the others. R. S. 1881, section 568.

SAME.—*Demand.*—Where the property has been wrongfully taken by the defendant from the plaintiff's possession, no demand is necessary to maintain replevin.

From the Monroe Circuit Court.

S. B. Voyles and *H. Morris*, for appellants.

G. W. Friedley, *E. D. Pearson* and *N. Crooke*, for appellees.

HAMMOND, J.—Action by the appellees against the appellants to recover the possession of a horse. The venue was changed to the court below from the Lawrence Circuit Court, in which the action was commenced.

The appellants answered jointly in two paragraphs. The appellant Alice M. Hamilton filed a cross complaint, which is designated as the third paragraph of the answer. The appellees' demurrer, filed to the second paragraph of the answer, was sustained. The appellees answered the cross complaint in three paragraphs, to the second and third paragraphs of which the appellant Alice unsuccessfully demurred. She then replied by the general denial. The issues were tried by the court and a finding made in favor of the plaintiff Browning, but against the other plaintiffs. Judgment was rendered on the finding over the appellants' motions in arrest of judgment and for a new trial. The rulings mentioned were severally excepted to, and are assigned for error.

The objections urged against the complaint have been removed by a full copy of that pleading which has been certified, under a *certiorari*, since the filing of appellants' brief.

The first paragraph of the appellants' answer was the general denial. The facts stated in the second paragraph of their answer amounted to nothing more than a special denial, and as evidence of such facts was admissible under the first paragraph, the error, if any, of sustaining the demurrer to the second paragraph, was harmless.

In her cross complaint, the appellant Alice sought to foreclose a mortgage on the property in controversy. This mortgage was alleged to have been executed by her co-appellant

to Daniel D. Hamilton to secure the payment of a note for $100. She averred in her cross complaint that the mortgage had been assigned to her, but there was no allegation that the note secured by the mortgage had been transferred to her. The assignment of a mortgage, without the assignment of the debt secured by it, transfers nothing to the assignee. *Hough* v. *Osborne*, 7 Ind. 140; *Johnson* v. *Cornett*, 29 Ind. 59; *Hubbard* v. *Harrison*, 38 Ind. 323. The cross complaint being wholly insufficient, there was no available error in overruling the appellants' demurrer to appellees' second and third paragraphs of answer thereto. A bad answer is good enough for a bad complaint. Without deciding the question, it may be suggested as doubtful, whether, in an action like the present, the remedy sought by the cross complaint would be allowable in any event.

It is objected to the finding of the court that as the evidence did not show a joint ownership of the property in all the appellees, there could not be a finding in favor of one of them and against the others. But section 568, R. S. 1881, provides that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants."

It is also urged against the finding that the evidence failed to show a demand before suit. It was proved that the appellee Browning purchased the horse in controversy at a sale under execution against the property of the appellant James N. Hamilton; that at the sale the property was claimed by the appellant Alice under the mortgage mentioned in her cross complaint; that when the sale was made, the officer delivered the horse to Browning, and that the appellant James, acting as it may be inferred for Alice, then took possession of the horse without Browning's consent. Under the evidence, we think no demand for the property from the appellants or either of them was necessary before bringing suit.

It may be gathered from the bill of exceptions, that the note and mortgage referred to in the cross complaint were

put in evidence. But they are not copied in the bill of exceptions, nor is reference therein made to the page of the transcript where they may be found. They are not in the record as evidence in any manner provided by statute, and can not, therefore, be considered. Section 626, R. S. 1881; *Crumley* v. *Hickman*, 92 Ind. 388. The mortgage and note not being in evidence, we are unable to say that Alice was entitled to the possession of the property under section 722, R. S. 1881, until the debt secured by the mortgage was paid.

There was no error in overruling the appellants' motion for a new trial.

Affirmed, with costs.

Filed March 26, 1884.

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No. 11,139.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY *v.* HARRIGAN.

RAILROAD.—*Animals Killed.—Fencing.—Complaint.—Demurrer.*—In an action against a railroad company to recover the value of two horses belonging to the plaintiff, alleged to have been killed by the defendant's locomotive and train of cars, where the complaint charged, *inter alia*, "that the railroad of the defendant was not fenced at the place where said horses got on the track and where said horses were killed," the allegation as to the want of fences is sufficiently definite and certain on a demurrer to the complaint for the want of facts.

BILL OF EXCEPTIONS.—*When Part of Record.—Filing.—Supreme Court.*—A bill of exceptions does not become a part of the record under section 629, R. S. 1881, until it has been filed; and, unless the transcript shows the filing of such bill, it cannot be considered by the Supreme Court as constituting a part of the record.

INSTRUCTIONS.—*Error in Giving or Refusing.—Record.—Evidence.—Supreme Court.*—In the absence of the evidence from the record, no available error can be predicated upon the instructions given, unless they are erroneous as mere abstract propositions of law, nor upon the instructions refused, for, even if they state the law correctly, the Supreme Court will presume they were properly refused as inapplicable to the case made by the evidence.

From the Parke Circuit Court.

A. D. Thomas, for appellant.

G. W. Paul and *J. E. Humphries*, for appellee.

HOWK, C. J.—This was a suit by the appellee to recover the value of two horses belonging to him, alleged to have been killed by the appellant's locomotive and train of cars at a place on the line of its railroad which was not securely fenced. This suit was commenced in the Montgomery Circuit Court and was there put at issue, when, upon the appellant's application, the venue of the cause was changed to the court below. There the issues joined were tried by a jury and a general verdict was returned for the appellee, assessing his damages in the sum of $300. Over the appellant's motion for a new trial judgment was rendered on the verdict.

In this court the appellant has assigned as errors the decisions of the circuit court (1) in overruling its demurrer to appellee's complaint, and (2) in overruling its motion for a new trial. Appellee's complaint originally contained two paragraphs, but before trial he withdrew the second paragraph, and the cause was tried below upon the issue joined on the first paragraph. The sufficiency of the first paragraph of complaint, therefore, is the only question presented for our decision by the first alleged error. In the first paragraph of his complaint the appellee alleged that on or about the 17th day of November, 1881, the appellant, by its agents and employees, was running and operating its line of railroad through Montgomery county; that the appellant, by its agents and employees, then and there ran its locomotive and train of cars upon and killed two horses belonging to the appellee, one of the value of $250, and the other of the value of $150; that both of said horses were so run upon and killed as aforesaid, in Montgomery county, without any fault or negligence of the appellee; "that the defendant has no fence on either side of said road at the place where said horses got on the track and where said horses were killed; that said defendant has no fence on either side of the said road where said horses were

killed; that the railroad of the defendant was not fenced at the place where said horses got on the track, and where said horses were killed;" that appellee was damaged by the killing of his horses in the sum of $400, which was due and unpaid. Wherefore, etc.

In discussing the sufficiency of appellee's complaint the appellant's counsel claims that the complaint is bad in this, that it fails to show that the railroad track was not securely fenced in at the time when and at the place where the appellee's horses entered upon such track. In the foregoing summary of the complaint we have quoted literally, and placed within the usual quotation marks the averments in regard to time and place. It will be seen therefrom that so far as time is concerned, these averments can be construed as having reference only to the time of filing the complaint, with the exception of the last averment which, by the tense of the verb used, relates to some indefinite time in the past. The record of this cause shows that the complaint was filed and the suit commenced in the Montgomery Circuit Court, on the 26th day of December, 1881; and it was averred therein that the appellee's horses were run over and killed "on or about the 17th day of November, 1881," upon the appellant's railroad track by its locomotive and train of cars. The complaint speaks, as of the date of its filing in the proper court, or clerk's office of the court. Therefore, it is claimed by the appellant's counsel, that the averments in the complaint "that the defendant *has* no fence," etc., only show that the defendant had no fence on either side of its road, etc., at the time the complaint was filed on the 26th day of December, 1881, but utterly fail to show that the road was not securely fenced in when the appellee's horses were run over and killed on November 17th, 1881, some forty days before the filing of the complaint.

We are not fully convinced by this line of argument; but conceding, without deciding, that the averments last referred to are insufficient, we are of opinion that the last allegation,

literally quoted in our summary of the complaint, makes the pleading good at least as against a demurrer thereto for the want of sufficient facts. This allegation was: "That the railroad of the defendant was not fenced at the place where said horses got on the track, and where said horses were killed." Appellant's learned counsel objects to this allegation on the ground that it is too indefinite and uncertain; but such an objection to a pleading, as we have often decided, can not be reached by a demurrer for the want of facts, and only by a motion to make the pleading or allegation more certain and specific. *Ohio, etc., R. W. Co.* v. *Collarn*, 73 Ind. 261 (38 Am. R. 134); *State, ex rel.*, v. *Neff*, 74 Ind. 146; *Bryan* v. *Moore*, 81 Ind. 9.

The demurrer to the complaint was correctly overruled.

Under the alleged error of the trial court in overruling the motion for a new trial, the first question discussed by the appellant's counsel relates to the sufficiency, or, as he claims, the insufficiency, of the evidence to sustain the verdict. Appellee's counsel insist, however, that the bill of exceptions, containing the evidence, is not properly in the record, for the reason that there is nothing in the record showing, or tending to show, that such bill had ever been filed. This point seems to be well made, and must be sustained. It is shown by the record that on the 8th day of May, 1883, the appellant's motion for a new trial was filed and overruled, and sixty days were then given to file bills of exception herein. There is in the record what purports to be a bill of exceptions, containing the evidence, which bill seems to have been signed by the judge, before whom the cause was tried, on the 30th day of June, 1883, and within the time given by the court. But there is no memorandum or file-mark, or recital of any kind, in the transcript before us which shows, or tends to show, that such bill of exceptions was filed in the trial court within the time given, or, indeed, at any time.

In section 629, R. S. 1881, it is provided that a bill of exceptions must be signed by the judge and "filed in the cause,"

and "When so filed, it shall be a part of the record." In the recent case of *Loy* v. *Loy*, 90 Ind. 404, this precise question was under consideration, and it was there said: "Where time is given beyond the term in which to file a bill of exceptions, and it appears that the bill was presented to and signed by the judge within the time limited, the record must show, in some manner, that the bill was filed, or it can not be considered in this court as constituting a part of the record of the cause." In the case at bar, therefore, it must be held that the evidence given on the trial is not a part of the record.

Appellant's counsel next complains in argument of the instructions of the court to the jury, and, also, of the court's refusal to give the jury other instructions at the appellant's request. All these instructions, as well those refused as those given, were made part of the record by bill of exceptions, filed in time and properly in the transcript. In the absence of the evidence from the record, however, we can not say that the court erred, either in giving or in refusing to give instructions to the jury. None of those given seem to be erroneous, as mere abstract propositions of law; and, in the condition of the record, it can not be said that they were not applicable to the case made by the evidence. Nor can it be said that the court erred in its refusal to give the instructions asked for by the appellant; for, if it be conceded that the instruction asked for stated the law correctly, yet, in the state of the record, we are bound to conclude that they were properly refused, because they were inapplicable to the case shown by the evidence; in other words, the record of this cause fails to show that the trial court erred in any of the rulings complained of by the appellant, and, in the absence of such a showing, it is conclusively presumed by this court that such rulings were not erroneous. *Myers* v. *Murphy*, 60 Ind. 282; *Bowen* v. *Pollard*, 71 Ind. 177; *Loy* v. *Loy*, *supra*.

The judgment is affirmed, with costs.

Filed Feb. 12, 1884. Petition for a rehearing overruled March 26, 1884.

No. 10,622.

THE PENNSYLVANIA COMPANY *v.* LONG.

NEGLIGENCE.—*Action by Parent Against Employer of Child.—Injury, Resulting in Death.—Evidence.—Declarations of Deceased.—Railroad Company.—Employment of Minor.*—In an action by a widowed mother against a railroad company for damages for the death of her minor son, employed by the defendant without her consent, wherein the complaint alleged that the deceased came to his death by reason of injuries received by him while performing certain dangerous work at which he had been put by the defendant, and in which he was unskilled, declarations by the deceased, made prior to the accident, that he was skilled in such labor, are inadmissible in evidence against the plaintiff.

SAME.—*Presumption.*—Employment of such minor, without the parent's consent, will, in the absence of other evidence, be presumed to be against the parent's will.

SAME.—*Instruction Assuming Negligence From Dangerous Employment.—Machinery.*—An instruction is erroneous in such case, which assumes that the defendant was culpably negligent merely because the employment in which the deceased was engaged was dangerous, and the different parts of the machinery were not adapted to each other.

From the Gibson Circuit Court.

S. O. Pickens, for appellant.

G. G. Reily, *W. C. Johnson* and *W. C. Niblack*, for appellee.

BICKNELL, C. C.—This was an action by the appellee, a widow, against the appellant, to recover damages for the death of James B. Long, her son, seventeen years old, who was killed in the appellant's service while undertaking to couple two of its cars at the city of Vincennes.

The complaint stated that the plaintiff's son was living with her and had no guardian; that defendant, without the knowledge or consent of the plaintiff and against her will, employed her son as a workman; that he had no experience in the work and was ignorant of its dangerous character; that the work consisted in part of making up trains, which was very dangerous; that in said work he was required by the defendant to assist in coupling two passenger cars on a sharp curve, which cars had couplings of different shapes

and unfit for coupling together, one of them being a straight draw-head, and the other a crooked draw-head, called the Miller patent, intended to fit in another crooked draw-head, and which would not readily connect with a straight draw-head; that the deceased, while one of said passenger cars was driven backward by an engine toward the other car, was directed by defendant to walk at the rear of the moving car, to couple it with the other, and when the cars came together, the said draw-heads, instead of meeting together and keeping the platforms of the cars apart, as they would have done if properly constructed, passed each other and let the platforms come together, so that they caught the deceased and killed him, without fault of the deceased or of the plaintiff, to plaintiff's damage $5,000.

The defendant answered by a general denial.

The issue was tried by a jury who returned a verdict for the plaintiff for $1,000, with answers to the defendant's interrogatories, as follows:

"1. Does the evidence show that the injuries from which the plaintiff's son died were received while making a coupling between two couplers known as the common draw-bar and the Miller coupler? Answer: Yes.

"2. Does the evidence show that both these kinds of couplers were in common use together upon the railroads of Indiana and at Vincennes, at and about the time of the injury? Answer: No.

"3. Was the plaintiff's son informed how to make the coupling? Answer: No.

"4. Was the plaintiff's son cautioned against the danger involved in making couplings? Answer: Yes."

A motion for a new trial and a motion in arrest of judgment by the defendant were overruled; judgment was rendered on the verdict and the defendant appealed.

The errors assigned are overruling the said motions.

Ten reasons were presented for a new trial, but the first of these is abandoned by the appellant. The second is that

"the court erred in excluding from the jury the evidence of Robert Henry, a witness for defendant, which evidence consisted of statements made by James B. Long at and during the time he was in the employment of the defendant, and during the four or five days next before the day of the injury; that he, said James B. Long, knew how to couple cars, and had made couplings often before that time in the defendant's yards at Vincennes."

As against the plaintiff, these declarations of her son in her absence were mere hearsay, and were properly excluded. The rights of the mother could not be defeated or qualified by such declarations of the son. Such declarations, in reference to an employment entered into without the mother's consent, could not affect her legal rights resulting from such employment and its consequences.

The third cause for a new trial is that the court erred in giving instructions to the jury. Instruction No. 2, given by the court of its own motion, is as follows:

"The facts necessary for the plaintiff, under the allegations of her complaint, to prove, in order to entitle her to a verdict, are the following: That in the month of December, 1879, James Long was in the employment of the defendant, and, at said time, while in the line of his employment and engaged in the effort to couple two passenger cars, he was crushed and killed between the platforms of the two coaches; that the plaintiff was the mother of said James, and that his father was dead at said date; that without the plaintiff's consent the defendant employed said James, he being under twenty-one years of age, to work in its railroad yard, and that among the duties of said employment was the coupling of cars; that on the night he was killed he was engaged, under the direction of the defendant, in assisting to make up a passenger train, and in pursuance of the direction of the defendant was required to pass and did pass onto the track between two cars in order to effect the coupling, and that, while he was between the cars, and owing to the want of adapta-

tion to each other of the Miller patent and common draw-bar couplers on the two cars, the platforms of the two cars came so nearly together as to crush and thereby kill him; that the effort to make such coupling was dangerous to the person making it; that the plaintiff incurred some expense in his burial, or that his services from the period of his death until of full age would have been of some value to her."

It is claimed that this instruction is erroneous, because it states that there may be a recovery by the parent, where the employment of the minor is without the parent's consent. The appellant claims that there can be no recovery by the parent unless the employment was not only without the consent, but was also against the known will, of the parent.

In *Grand Rapids, etc., R. R. Co.* v. *Showers*, 71 Ind. 451, the averment and the proof were that the employment of the child was against the parents' will, and this court held that such an employment might be the basis of liability. Where, however, the employment is without the parents' consent, and nothing further is shown, it is presumptively against the parents' will.

The right of the mother to recover in such cases is recognized in *Ohio, etc., R. R. Co.* v. *Tindall*, 13 Ind. 366; *Hollingsworth* v. *Swedenborg*, 49 Ind. 378 (19 Am. R. 687); *Rogers* v. *Smith*, 17 Ind. 323; *Long* v. *Morrison*, 14 Ind. 595; *Boyd* v. *Blaisdell*, 15 Ind. 73.

There is no intimation in any of these cases that the liability of the employer to the parent can not exist, unless the child was employed against the parents' *known* will. We think the instruction was not erroneous in this particular.

The appellant's counsel objects to instruction No. 2, that it told the jury, substantially, that if the deceased, being under twenty-one years of age, was put at work by the defendant in a dangerous place, the plaintiff ought to recover; but such is not the effect of the instruction. Its statement is that if the deceased, being under twenty-one years of age, was employed by the defendant, without the plaintiff's consent, and

was set to work coupling two cars, one of which had a Miller patent coupler and the other a common draw-bar coupler, and that if this was dangerous work, and if by reason of the want of adaptation to each other of the two couplers, the platforms of the cars came together and crushed and killed the deceased, then, upon proving such facts, the plaintiff could recover.

The statute provides that the mother may maintain an action for the injury or death of a child. R. S. 1881, section 266. But the death must be caused by the wrongful act or omission of another. R. S. 1881, section 284.

The mere employment of a minor, without his parents' consent, could not be the proximate cause of his death, and merely putting him in a dangerous employment would not create liability for his death thereby, unless it appeared that he was inexperienced, and that the defendant failed to instruct him how to avoid the danger; but if the couplers were not fit to couple, one of them being straight and the other crooked, and if by reason of such unfitness the couplers did not meet, but passed each other and let the cars come together and crush the deceased, then, if the law is that the use of such couplers is conclusive evidence of culpable negligence, the second instruction was right; otherwise it was wrong.

The instruction assumes that the use of such couplers was culpable negligence. In this we think the court erred. The rule in relation to negligence of a railroad company in the use of machinery and appliances should have been stated, and it should have been left to the jury to determine whether, in the present case, applying that rule to the facts, culpable negligence existed.

In *Lake Shore, etc., R. W. Co.* v. *McCormick*, 74 Ind. 440, this court said: "The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger."

In *Umback* v. *Lake Shore, etc., R. W. Co.*, 83 Ind. 191, this

court said: "The obligation of the master to provide suitable and safe machinery and appliances does not, however, impose upon him the duty of using extraordinary care and diligence, but does require him to be ordinarily careful and diligent."

In *Fuller* v. *Jewett*, 80 N. Y. 46 (36 Am. R. 575), it is said: "But the duty of the master to furnish suitable and safe machinery, and to keep the same in repair, is relative and not absolute. .He is only bound by himself and his agents to exercise due care to that end."

In *Louisville, etc., R. R. Co.* v. *Orr*, 84 Ind. 50, in was held erroneous to instruct a jury that "It would be negligence upon the part of the defendant to use a crab for hoisting timbers that was defective in its construction, when said crab could have been made complete and safe, or there were others to be secured that were complete and not dangerous."

The court said: "This instruction renders the master liable, if the machinery is defective, however much care and prudence have been exercised in its selection or use. * * * The defendant, in the absence of negligence, was not liable, because it did not have the best crab in use."

These cases show that the instruction under consideration was erroneous in assuming that it was culpable negligence in the defendant to use the Miller patent coupler to couple with a common draw-bar coupler. The case of *St. Louis, etc., R. W. Co.* v. *Valirius*, 56 Ind. 511, so far as it is in conflict with the subsequent cases above cited, can not be followed; it was upon this point condemned in *Umback* v. *Lake Shore, etc., R. W. Co., supra*, and in *Lake Shore, etc., R W. Co.* v. *McCormick, supra.*

The employee in this case was a minor. It is true that it tends to show gross negligence in a railway company to employ an inexperienced person, knowing him to be such, in any hazardous and dangerous business, unless such company makes known and explains fully the hazard and danger, and instructs such person how to avoid the danger.

It is also true that youth is evidence of inexperience, and

that in general greater strictness of the rule should be required in the employment of minors than in the employment of persons of maturer age. But these considerations do not change the rule laid down in the cases above cited and herein relied on.

Instruction No. 2 can not be sustained, because it asserts absolutely as matter of law that if the work was dangerous and the deceased was killed by reason of the want of adaptation to each other of the two couplers, the plaintiff would have a right to recover; whereas, it was the office of the jury to determine, whether under the law, correctly stated, culpable negligence existed on the part of the defendant.

As the judgment must be reversed for the error in instruction No. 2, it is unnecessary to consider the other errors assigned.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment of the court be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Filed Dec. 13, 1883.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellee in this petition claims that the instruction was right, and that if wrong it was harmless. The instruction was not right, because it stated that the plaintiff would be entitled to recover on proving that it was dangerous to make such a coupling, and that the deceased was directed to make it, and that in making it he was killed by reason of the want of adaptation to each other of the two couplers.

A great deal of work about railways is dangerous. It does not follow that because the work required is dangerous, therefore, if the workman be hurt, the employer will be liable. The jury should have been told: If you find that such facts are proved, and also find that they show negligence in the defendant, the plaintiff may recover.

The instruction, as given, means either that such facts of themselves constitute negligence, which the judge had no right to assume, or else it means that such facts, if proved, were sufficient to authorize a recovery without reference to the question of negligence, and in either view the instruction was wrong. It states that the plaintiff will be entitled to recover if certain facts are proved, of which negligence is not one. Such an instruction could not be harmless; it may have caused the verdict; the presumption is it did. The petition should be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed March 27, 1884.

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No. 11,140.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. WHITE.

RAILROAD.—*Fence.*—The fact that adjoining land-owners may have erected fences along a railroad does not relieve the company from the duty of keeping its track securely fenced.

INSTRUCTIONS.—An instruction, substantially given, may be refused.

SAME.—Imperfection in a single instruction is not available error, if other instructions given, taken in connection with it, fairly declare the law.

From the Parke Circuit Court.

A. D. Thomas, for appellant.

G. W. Paul and *J. E. Humphries*, for appellee.

ZOLLARS, J.—Action by appellee to recover the value of cattle killed on the line of appellant's railroad by one of its trains. The action is based on the statute in relation to fencing. After charging the time and place of the killing, the complaint contains the averment that at the place where the animals entered upon the railroad track and were killed, it was not fenced. Taken in connection with the other allegations of the complaint, this averment sufficiently connects the want of a fence with the time of the killing. The kill-

ing was done in Montgomery county. On a change of venue the case was tried in Parke county. There is evidence in the record, very positive in character, that prior to 1849 or 1850, what was known as a State road was located, opened and graded through at least a portion of Montgomery county; that it was intended to be a macadamized road, but was never finished beyond the grading and the building of culverts; that at some places the cuts and fills covered the entire width of the highway, viz., sixty feet; that in 1849 or 1850 the board of commissioners of Montgomery county granted to appellant the right to lay its track upon and use about two miles of the highway for the purposes of its railroad, and that the company laid its track upon the highway, and has ever since so used it. So far as shown by the evidence, the public and the adjoining land-owners have acquiesced in that occupancy. The appellee is one of the adjoining land-owners. The animals escaped from one of his adjoining fields and went upon the track, two of them being killed and one injured. Appellant does not dispute its occupancy, but its contention is that it has not and does not now occupy the whole of the highway; that, during the entire time of its occupancy, the public have used a part of the old State road as a public highway; that the highway so used is parallel with the railroad, a portion of the distance on one side and a portion of the distance on the other; that at the place where the animals went upon the track, the highway so used by the public is between the railroad and appellee's land; that at that point the company could not maintain a fence without interfering with the use of the highway by the public; in short, could not do so without trespassing upon the public highway. The contention of appellee is that the company has had the use and occupancy of the whole of the old State road so far as its track was laid upon that road; that after the construction of the railroad, the old State road was abandoned as a public highway, and has never since been so used; that while there has been and still is a way parallel with the rail-

road, partly on either side of it, over which the people occasionally pass, it has not been and is not now a public highway, nor has it been wholly upon the old road; that at some places the top of the cuts and base of the fills are as wide as the old road, so that the way now occasionally travelled, at these points at least, is outside of the old highway; and that at the place where the animals entered upon the railroad a fence might be maintained between the railroad and the travelled way. The evidence tends to sustain appellee's contention. Some of the evidence seems to have been given with reference to some map shown to the witnesses. That map, if there was any, is not in the record, and hence many answers made with reference to it are unintelligible. Where the cuts and fills cover the width of the old road, the railroad company has necessarily occupied the whole of that road. At these points a joint user with the public would seem to be impossible. There is no evidence that any work has been put upon the road, or any portion of it, since it has been occupied by the railroad company. The facts that the road has been thus neglected, that the board of commissioners gave the railroad company the right to lay its track upon the road, and that there has been an acquiescence in that occupancy by all parties for more than thirty years, and that at the cuts and fills, or some of them, the company necessarily occupied the entire road, are sufficient to justify the jury in finding that the old road was abandoned by the public, and has ceased to be a public highway. *Jeffersonville, etc., R. R. Co.* v. *O'Connor*, 37 Ind. 95.

We are referred by counsel to the case of *Louisville, etc., R. W. Co.* v. *Francis*, 58 Ind. 389, where it was held that the company was not bound to fence, and we are told that that case involved the locality involved in the case before us. That may be so; we can not so determine, however, by a reading of that case. However the fact may be in this regard, that case was decided upon a state of facts entirely different from the facts in the case before us. In that case it was shown

without any conflict in the evidence, that the travelled way was a public highway. On either side of the railroad the adjoining farmers have maintained fences, but this does not fill the requirements of the statute that the railroad company shall fence its road. What is the character of those fences is not shown by the evidence. Looking to the whole evidence, we can not say that the railroad company was not in fault in failing to fence its track, and hence can not reverse the judgment on the weight of the evidence. So far as shown by the evidence in this case, there is nothing to prevent the railroad company from fencing in the space covered by the old road.

Neither can we reverse the judgment upon the instructions. We have carefully examined all of them, and especially those complained of. The objections urged against them, we think, are not tenable. If the eighth instruction stood alone, there might be some plausibility in the objections urged against it, but considered in connection with the other instructions, especially the sixth given by the court, it furnished no ground for complaint. In the sixth the jury were instructed, substantially, that the company was not bound to maintain a fence at the place where the cattle entered upon the track, unless it could do so without interfering with the rights of the public or with the free use of the property belonging to private individuals or its own property. This was surely as favorable to the railroad company as it had a right to ask. There is nothing in the eighth instruction in conflict with the sixth, or that in any way weakens it.

The substance of the fourth instruction, asked by appellant and refused, is embraced in the instructions given by the court of its own motion.

Upon an examination of the whole case we find nothing that would justify a reversal of the judgment; it is therefore affirmed, with costs.

Filed March 26, 1884.

No. 10,585.

MILLIKAN ET AL. v. TEMPLE.

PRACTICE.—*Complaint of Two Paragraphs.—Demurrer to Complaint.—Ruling as Error.—Waiver of Error as to One Paragraph.—Supreme Court.*—A demurrer to a complaint of two or more paragraphs, as an entirety, if either one is good, should be overruled. If such demurrer is overruled, and such ruling is the only error assigned, and, pending the appeal, the defendant files a written waiver of any and all errors as to the overruling of the demurrer, and the judgment below, as to one paragraph of the complaint, the record will show no error in overruling the demurrer to the other paragraph or paragraphs of the complaint, and the Supreme Court must affirm the judgment.

From the Tippecanoe Circuit Court.

G. O. Behm and *A. O. Behm*, for appellants.

J. R. Coffroth and *T. A. Stuart*, for appellee.

HOWK, J.—By the record of this cause and the appellants' assignment of error endorsed thereon, the only question presented for the decision of this court is the sufficiency of the facts stated in appellee's complaint to constitute a cause of action against the appellant Frank Millikan.

The appellee's complaint contained two paragraphs, and the demurrer of the appellant Millikan was to the complaint as an entirety, and not to each paragraph separately. The demurrer was overruled by the court to the entire complaint, and the only error assigned by the appellants, in this court, is thus assigned: "That the court erred in overruling the demurrer of Frank Millikan to the appellee's complaint." After the record and the appellants' assignment of error thereon, in this cause, were filed in this court, a written agreement signed by the counsel of the respective parties, appellants and appellee, was also filed herein, in substance as follows: "Since the appeal was taken in this case, the appellant Millikan has received the full amount due him for the taxes paid by him, upon the real estate mentioned in the first paragraph of plaintiff's complaint. It is therefore agreed

that appellant shall amend his assignment of errors, in this case, by striking out all that part thereof that relates to the matters alleged in that first paragraph of complaint. And any and all errors, as to the overruling of the demurrer and the judgment of the court below, are hereby waived as to that paragraph of complaint."

This agreement was filed in this court on the 29th day of May, 1883; and, although more than five months have since elapsed, the appellant has not amended his assignment of errors. Indeed, we can not see that any anendment can be made to the appellant's assignment of errors. The only ruling or decision of the trial court, to which any exception was saved or reserved by the appellants or either of them, was the overruling of the demurrer of the appellant Millikan to appellee's complaint as an entirety. Upon this ruling, it is very clear, we think, that the appellants could not have properly assigned, as error, that the court had erred in overruling a demurrer to the first paragraph, or to the second paragraph of appellee's complaint; for the necessary and sufficient answer to such an assignment of error would be that no such error is shown in or by the record. Where the complaint contains two or more paragraphs, and the demurrer is to the complaint as an entirety, it is settled by the decisions of this court that the demurrer must be overruled if any one of the paragraphs is good. *Urton* v. *Luckey*, 17 Ind. 213; *Jewett* v. *Honey Creek Draining Co.*, 39 Ind. 245; *Romine* v. *Romine*, 59 Ind. 346.

If, therefore, in the case at bar, the first paragraph of the appellee's complaint is good, it is certain that the court did not err in overruling the demurrer to the complaint as an entirety, even though the second paragraph is clearly bad. The sufficiency of the first paragraph of the complaint is not now called in question in this court; for the appellant, as he had the right to do, has expressly waived "any and all errors as to the overruling of the demurrer, and the judgment of

the court below, as to that paragraph of complaint." In the consideration of this cause, therefore, we must assume that the first paragraph of the complaint is good, and that in overruling the demurrer to that paragraph, the court committed no error. The first paragraph being good, the question of the sufficiency or insufficiency of the second paragraph is not presented for our consideration by the ruling assigned as error; because, whether the second paragraph be good or bad, the ruling of the court, complained of by the appellants, was not erroneous.

In this state of the case, we are of opinion that we must affirm the judgment.

The judgment is affirmed, with costs.

Filed Nov. 1, 1883. Petition for a rehearing overruled March 28, 1884.

No. 10,885.

BISH v. VANCANNON.

94 263
164 598

FRAUD.—*Complaint.—Bargain and Sale.*—A complaint for damages for fraud practiced upon the plaintiff, by the defendant, in an exchange of lands, is insufficient when there is no allegation that any such exchange had ever been made, nor that any loss otherwise had been sustained by the plaintiff on account of the fraud alleged.

PRACTICE.—*Motion in Arrest After Demurrer to Evidence.*—A defendant does not waive his right to test the sufficiency of the complaint by a motion in arrest, by demurring to the plaintiff's evidence.

Quære, does the defendant's demurrer to the plaintiff's evidence waive his right on appeal to question the overruling of his demurrer questioning the sufficiency of the complaint?

From the Huntington Circuit Court.

I. VanDevanter, J. W. Lacey, W. VanDevanter, A. Steele, R. T. St. John, R. G. Steele, G. W. Harvey, J. C. Branyan, C. W. Watkins and — *Branyan*, for appellant.

B. M. Cobb, J. B. Kenner, J. F. McDowell, G. S. McDowell and *G. W. Gibson*, for appellee.

FRANKLIN, C.—Appellee sued appellant for alleged fraud in a land trade. The complaint was originally in two paragraphs, and against Bish and wife.

On motion of plaintiff the cause of action was dismissed as to the wife and as to the first paragraph of the complaint, and that paragraph was withdrawn. A demurrer was overruled to the second paragraph. Issues were formed and a trial commenced before a jury; when the plaintiff closed his evidence the defendant demurred to the evidence. The court overruled the demurrer, assessed the damages and rendered judgment thereon over motions for a new trial and in arrest of judgment.

The sufficiency of the second paragraph of the complaint is called in question by the demurrer, the motion in arrest of judgment and the specification in the assignment of errors, that the complaint does not state facts sufficient to constitute a cause of action. The charging part of the second paragraph of the complaint reads as follows:

"That the plaintiff, on the 9th day of October, 1877, was the owner of the northeast fractional quarter of section 22, township 24, range 7 east, containing 134 acres, of the value of $6,000, situate in Franklin township, Grant county, Indiana. And the said defendant knowing that said plaintiff was desirous of exchanging or trading the same for Western lands, and said Bish being the owner of lands in the State of Kansas, to wit, the north half of section 21, township 13, range 10 south, containing 320 acres, more or less, proposed to trade or exchange his said Kansas land for said plaintiff's said Grant county land. Said plaintiff further states that said defendant, for the purpose of inducing said plaintiff to make said trade, sale or exchange with him for his said Kansas land, did, on said 9th day of October, 1877, falsely and fraudulently represent to said plaintiff that his said Kansas land, above described, contained over 200 acres of first-class bottom or farm lands, with a small creek or branch running across the west end; that there was a big

spring on said land that never was known to fail since the country was settled; that said spring afforded water sufficient for an ordinary herd of cattle the year round; and that the remainder of said land was first-class slope farm land, all clear of rock except a little piece or patch in southwest corner, and that was scattered over with loose limestone rock that could easily be picked up on the top of the ground; that there was no rock sticking up on the top of the ground at all; that there was more rolling land in cultivation in Washington township, Grant county, than there was in the half section; that there was cotton-wood timber along the creek eight inches through and under, and tall and nice, and the underbrush sufficient for shade; that it was worth $10 per acre; that if the land was not as he represented it to be, he would make it so; and that he had been on the land and all over it, and that it was precisely as he represented it to be, and even better than he said it was.

"Said plaintiff further states that he informed said defendant at the time, that he knew nothing about the land nor its value, nor its situation, nor condition; that he desired to sell, trade, or exchange his farm for good Western land well adapted to farming purposes, well watered, with sufficient timber, to move to and make a home out of, and that if he so traded with or exchanged lands with him, he would rely entirely upon his statements and representations concerning the same.

"Said plaintiff further states that said defendant, for the purpose of cheating and defrauding this plaintiff out of his said above described Grant county land, so made said false and fraudulent statements and representations as aforesaid, knowing the same to be false in every particular, and well knowing that said plaintiff was wholly relying upon the statements so made by said defendant to him at the time of, and prior to, said trade and exchange.

"Said plaintiff further charges that said defendant's statements were false in this, that there was no bottom or first-class farm land on said Kansas land; that there was no small

creek or branch; that there was no spring whatever on the same; that there was no first-class slope land on it; that there was no timber or shade on it; that it was worthless, being broken and hilly, covered all over with rock so as to be totally unfit for cultivation or farm purposes in any manner whatever, and that the same was of no value, all of which facts said defendant well knew. Yet plaintiff avers that by the fraudulent means aforesaid the defendant had perpetrated a great fraud upon him, whereby he sustained damages in the sum of $8,000, for which he demands judgment and other proper relief."

This complaint is certainly defective; it appears to have been closed before it was finished. It nowhere shows that the plaintiff was in any wise affected by the alleged false representations of the defendant. There is no allegation that the plaintiff acted upon the alleged fraudulent representations by exchanging the lands referred to, or that he did anything else on account thereof. There can be no available fraud without an injury.

The ignorance of the plaintiff of the facts, and his reliance upon the defendant's representations, are not affirmatively stated, but only inferentially by alleging that the defendant was informed and well knew such to be the case. This is not a sufficient mode of pleading.

The plaintiff may have a good cause of action, but, if so, he must state it in his complaint, when the proper objection is made, before the defendant can be required to answer.

Where a demurrer to a complaint has been overruled, and a demurrer to the plaintiff's evidence has been filed, in considering the demurrer to the evidence, defects in the pleadings can not be taken into consideration. But upon appeal we see no good reason why the demurrer to the evidence should waive the demurrer to the complaint; by the demurrer to the complaint being overruled, the defendant was compelled to take issue upon the complaint as it was, and submit

to a trial. A demurrer to evidence is only one of the modes of trial, and only tests the sufficiency of the evidence. But without deciding anything upon this question, we think there is no doubt but the sufficiency of the complaint can be tested by the motion in arrest of judgment, and perhaps, under our statute, by the specification in the assignment of error that the complaint does not state facts sufficient to constitute a cause of action. See the case of *Lindley* v. *Kelley*, 42 Ind. 294. In the case of *Cort* v. *Birkbeck*, 1 Doug. 218, it was held that the ruling upon a demurrer to evidence had the same effect as a verdict by the jury, except as to the assessment of damages, and that required a writ of inquiry. Lord MANSFIELD, in rendering the opinion, then adds: "After that, the defendant may take advantage of any objection to the declaration, by moving in arrest of judgment, or bringing a writ of error."

Under the practice of writs of error, the question as to the sufficiency of the complaint could be brought up by a demurrer having been overruled to it. But as we have no writs of error, since they were abolished by statute, and whether the defendant by demurring to the evidence, did or did not waive his demurrer to the complaint, he did not preclude himself from afterwards testing the sufficiency of the complaint by his motion in arrest of judgment.

The court erred in overruling the motion in arrest of judgment, for which error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded with instructions to the court below to sustain the motion in arrest of judgment, and for further proceedings in accordance with this opinion.

Filed March 27, 1884.

No. 8926.

VESTAL v. ALLEN ET AL.

94 268
127 304
94 268
137 285

FRAUDULENT CONVEYANCE.—*Action Against Debtor's Heirs by Creditor.—Limitation.—Administrator a Necessary Party.—Final Settlement Unrevoked.—Collateral Attack.*—In an action by a judgment creditor against the heirs of a deceased insolvent debtor, to set aside an alleged fraudulent conveyance by the debtor to said heirs, the debtor's administrator is a necessary party to the action; and where, in such action, it appears from the complaint, that, more than three years prior to the commencement of such action, the debtor's estate had been finally settled, in due course of administration, and that such settlement remains unrevoked, the action can not be maintained, and the complaint is insufficient.

SAME.—Even if such settlement had been made within less than three years prior to the commencement of such action, as long as it remains unrevoked such action will not lie.

From the Putnam Circuit Court.

S. Claypool and *L. P. Chapin*, for appellant.

D. E. Williamson and *A. Daggy*, for appellees.

COLERICK, C.—This was an action brought by the appellant against the appellees. A demurrer to the complaint, alleging insufficiency of facts, was sustained, and the appellant refusing to amend, final judgment, on demurrer, was rendered against him, from which he appeals, and assigns as the only error for the reversal of the judgment the ruling of the court upon said demurrer.

The material facts averred in the complaint were that on or about the — day of January, 1855, Andrew T. McCoy, Barney Allen and the appellant became and were jointly and severally bound as sureties for the payment of certain bills and notes executed by one James M. Robinson, as principal, in a large sum, to wit, $20,000; that Robinson became insolvent, and afterwards the appellant, as one of said sureties, paid of said indebtedness the sum of $9,600, McCoy the sum of $7,900, and Barney Allen the sum of $2,100; that on the — day of ——, 186–, said Allen died, and afterwards, on the 11th day of October, 1869, the appellant and

McCoy obtained a judgment against the estate of said Allen, in the Putnam Circuit Court, for contribution, McCoy for $1,400 and the appellant for $400, and that afterwards the estate of said Allen was finally settled, without paying any part of the appellant's claim; that the personal property of the decedent was sold by his administrator, and the proceeds thereof applied in payment of the debts of said estate, but that no part thereof was applied on the appellant's claim; that there was no administrator of said estate at the time, nor since the bringing of this action, and that said estate is wholly insolvent. It is then averred that Allen, in his lifetime, was the owner of certain real estate (which is described), and that, on the — day of ——, 1859 or 1860, the Indianapolis Branch of the Bank of the State of Indiana recovered a judgment against Allen and others for $3,900, upon which judgment an execution was issued, and that under and by virtue thereof said real estate was sold by the sheriff of said county to one Tousey for said bank, and that afterwards, on the 4th day of June, 1863, said Allen, with his own money, paid to said bank the sum for which said real estate had been sold to the bank, and procured said bank, by its president, to make a conveyance of said real estate to Martin Allen, Wiley Allen and Evaline Saunders, his adult children, without any consideration therefor being paid by them, and for the purpose of cheating and defrauding his creditors, and particularly the appellants, at which time said Barney Allen was insolvent, and afterwards died without any estate, etc. Wherefore he prayed judgment for $5,000 and a decree for the sale of said real estate, as upon execution, to pay the same, and other relief.

This case was once before in this court, the present appellees being the appellants. See *Allen* v. *Vestal*, 60 Ind. 245. The judgment of the court below was then reversed, because of the insufficiency of the complaint, there being no averment therein that an administrator of the estate of Barney Allen had not been appointed. It was held by this court

that the administrator, if one existed, was a necessary party to the action, and that if no administrator existed it was the duty of the creditor to obtain the appointment of one.

The decision on the former appeal is the law of the case throughout all subsequent proceedings. Upon the remanding of the action to the court below, the appellant herein amended his complaint by inserting therein the averment, "And afterwards the estate of said Barney Allen was finally settled without paying any part of the claim of the plaintiff, and the personal property of said Allen, deceased, was sold by his administrator, and the proceeds applied in the payment of debts of said Allen, and no part was paid on plaintiff's debt. And plaintiff says there was no administrator of said Allen's estate at the time nor since the bringing of this suit, and said estate is wholly insolvent."

The question presented for our consideration is, whether the complaint, as amended, was sufficient. It has been decided by this court that a creditor of a deceased debtor may prosecute an action to set aside a fraudulent conveyance executed by the debtor, so that the property fraudulently conveyed may become assets for the payment of the debts of the decedent. See *Bottorff* v. *Covert*, 90 Ind. 508; *Willis* v. *Thompson*, 93 Ind. 62. In the case first cited it was said: "If he is willing to assume the risks of a contest, the fruits of which, if successful, will enure to the benefit of all the creditors, we know of no good reason why he may not maintain the action. * * * It was proper to order the land sold, but the proceeds should not be applied upon the judgment to the exclusion of other creditors, if any. The proceeds must be applied upon the debts generally." And in the case last cited it was said: "The law, as enunciated in these cases is, that a creditor, as well as the administrator or executor of an estate, may prosecute the action, but, if prosecuted by a creditor, he must make the administrator or executor, if there is one, a party thereto; and, if there is none, he must, for that purpose, have an administrator appointed,

so that the interests of the estate may be represented and protected, as the proceeds arising from the sale of the real estate fraudulently conveyed, if sold to pay the debts of the decedent, pass into the hands of the administrator, to be administered by him, like other assets of the estate, except that any excess remaining after paying the debts of the decedent is to be paid to his grantee and not to his heirs, as the conveyance between the parties thereto and their heirs is valid. The action, whether prosecuted by the administrator, executor or creditor, is for the benefit of all the creditors."

These decisions are in harmony with earlier ones rendered by this court. See *Barton* v. *Bryant*, 2 Ind. 189; *McNaughtin* v. *Lamb*, 2 Ind. 642; *Butler* v. *Jaffray*, 12 Ind. 504. In *Barton* v. *Bryant*, *supra*, this court said: "The conveyances must be considered void as to all the creditors of the grantor, and that, upon his death, the liability of the property to the intestate's debts was the same as if the conveyances had never been made. The following authorities are to this point: In a suit in chancery by some of the creditors of a deceased debtor on behalf of themselves and the other creditors to set aside a settlement as fraudulent, it was held that if the settlement was void as to any of the creditors it was void as to all. The court said: 'If it be once shown that it is a deed which, as against any of the creditors, can not stand, then the property becomes assets, and is applicable to the payment of debts generally; all the creditors come in at whatever times their debts may have arisen. That is decided.' *Richardson* v. *Smallwood*, Jacob, 552." Mr. Williams says: "Where a deed is set aside as fraudulent against any of the creditors of the deceased, the property becomes assets, and subsequent creditors are let in. An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executors." 3 Will. Executors, 1679.

In *McNaughtin* v. *Lamb*, *supra*, it was held that "the entire proceeds of the sale should be paid into court to be distributed amongst creditors, should there be such, in the

course of administration." And in *Butler* v. *Jaffray, supra,* it was held that in an action to reach property fraudulently conveyed by a deceased debtor, the administrator of the estate should be made a party to the action. The court said: "In such case, the administrator should be made a party, that the property, when recovered may be received by him, and go in a course of administration. A single creditor, or a few creditors of the deceased debtor, can not, by suit in chancery, have the property of the estate sold for the payment of their own demands, without any inquiry as to the rights of other creditors." See, to same effect, 1 Am. L. C. 43; *Brockman* v. *Bowman,* 1 Hill Eq. 338; Bump Fraud. Conv. 535. In *Brockman* v. *Bowman, supra,* it was held that "Where a bill is filed by creditors to avoid the alienation of a deceased person for fraud, his executor or administrator is a necessary party; and if the court should set aside the conveyance, it will order the property to be delivered to the executor or administrator, to be applied in due course of administration. The suing creditors are not entitled to have their demands paid out of the property, in preference to others." In Am. L. C., *supra,* it is said: "The creditors are entitled to go into equity against the property in the hands of the fraudulent grantee; and in such a proceeding, the administrator ought to be made a party, that the property when recovered may be received by him, and go in a course of administration." And in Bump, *supra,* it is said: "If the debtor is deceased, an administrator should be appointed, and made a party defendant, so as to account for the assets that may come to his hands."

As indicated by the authorities cited, it may be considered as settled that property fraudulently conveyed by a deceased debtor is to be treated as assets of his estate, and to be administered the same as other assets, and, hence, it is necessary that an administrator shall exist to receive and administer the same. It appears by the averments in the complaint, that the estate of Barney Allen was finally settled, and the administrator thereof discharged before the commencement

of this action. The final settlement of an estate may be reopened within three years from the time it is made, for mistake or fraud. R. S. 1881, section 2403. A similar statutory provision has existed in this State since, at least, 1852. In this case it appears that more than three years have elapsed since the final settlement of said estate. What result flows from the final settlement so made? In *Pate* v. *Moore*, 79 Ind. 20, it was said by this court: "It necessarily follows that so long as the final settlement of an estate remains unrevoked, and in full force, letters of administration *de bonis non* can not be issued on such estate, nor can any further administration upon such estate be permitted by any executor or administrator however appointed. In such a case all matters pertaining to the ordinary settlement of the estate are *res adjudicata*." And in *Beard* v. *First Presbyterian Church*, 15 Ind. 490, it was said: "If a settlement should be made without, in some manner, finally disposing of the debts against such estate, within the knowledge of the administrator we suppose, under this statute, in connection with well known legal principles, the creditors, unsatisfied, would be barred any further action against such administrator, after three years. They could not, without getting rid of the final settlement, proceed in an attempt to collect the claim, even upon a judgment of record, because, by the final settlement, the administrator would have rid himself of all assets to meet such debt, and have been discharged, by the court, from further liability in reference thereto."

The purpose of this action was to collect a debt against an estate that had been finally settled, and the settlement thereof unrevoked. Such an action can not be maintained. If the appellant, before or after the rendition of his judgment, believed that the real estate in controversy was liable for the payment of the debts of said estate, it was his right, as decided in the cases cited, before the final settlement of the estate was made, to prosecute, in his own name, an action to

set aside as fraudulent the conveyance which the decedent caused to be made to his children, and, if fraudulent, subject said real estate, as assets, to the payment of the debts of the estate. This the appellant did not do, but permitted the estate to be finally settled, without so subjecting said real estate to the payment of said debts. It is too late after the final settlement of an estate has been made, which remains unrevoked, to prosecute an action like this. If the administrator of the estate had reasonable cause to believe that the conveyance in dispute was fraudulent, and failed to take the necessary proceedings to have the same set aside, and the property subjected to the payment of the debts of the estate, he would have been liable on his bond for neglect of duty.

As the administrator of the estate of Barney Allen was a necessary party to the action, and was not made a party thereto, and as it appeared by the averments in the complaint that said estate had been finally settled, and the settlement thereof unrevoked, the complaint, for those reasons, was insufficient, and, therefore, no error was committed in sustaining the demurrer thereto. The judgment must be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the appellant's costs.

Filed March 27, 1884.

No. 10,853.

GEORGE v. BROOKS.

PRACTICE.—*Harmless Striking Out of Part of Pleading.*—The striking out of part of a paragraph of a pleading is harmless, where the same facts are set out in a remaining paragraph.

SAME.—*Harmless Ruling on Demurrer.*—The sustaining of a demurrer for insufficiency to one paragraph of a pleading is harmless, when the same facts are alleged in a remaining paragraph.

SAME.—*Evidence.—Disaffirmance of Deed by Minor.*—A written notice of disaffirmance of a deed executed by a minor may be given in evidence under a paragraph which alleges disaffirmance either in general terms or by setting out such notice specially.

From the Hamilton Circuit Court.

W. Booth and *J. Stafford*, for appellant.

D. Moss, *R. R. Stephenson* and —— *Lee*, for appellee.

ZOLLARS, J.—Appellant commenced this action in March, 1882, against appellee, to avoid a deed which, upon its face, purports to have been executed by appellant and her husband in 1858, and to quiet her title to the land described in the deed. Two alleged errors are discussed in this court, viz., the striking out of a portion of the first paragraph of the complaint and the sustaining of a demurrer to the second paragraph.

In the first paragraph, which was sworn to, the execution of the deed is denied. Following this, there was a lengthy recitation of facts which tend to show that if appellant did execute the deed, the execution was procured by fraud. It would seem that appellant has not much ground for complaint, because she was not allowed to unite two inconsistent causes of action in the same paragraph. If it should be conceded that the court erred in striking out the portion of the first paragraph, the error was clearly a harmless one, as all the facts stated in the portion struck out were embodied and re-asserted in the third paragraph of the complaint, to which no demurrer was filed. Appellant thus had the opportunity of availing herself of those facts upon the trial.

The second and third paragraphs of the complaint are in all essential matters the same. In each appellant seeks to overthrow the deed and recover the land upon the averments that when she executed the deed she was a married woman, under twenty-one years of age, and that the deed was procured by fraud. In each there is a lengthy recitation of facts to show what constituted the fraud. These facts, so recited, are in every essential respect the same in each paragraph. The only difference between the two paragraphs that needs to be mentioned is, that in the second paragraph a notice of disaffirmance, which was served upon appellee before the bring-

ing of the action, is set out in full. In the third, the fact of such disaffirmance is averred without setting out the notice served. This difference, however, is not at all material. Under the averment in the third paragraph, the proof of such disaffirmance could be introduced just as effectually as if the written disaffirmance were set out in full. The sustaining of the demurrer to the second paragraph was, therefore, a harmless error, if error at all. As appellant had the benefit of a trial upon the facts averred in the first and third paragraphs of her complaint, we need not decide whether or not the second stated sufficient facts to withstand the demurrer. Nor need we decide whether, under the first and third, she was entitled to the relief demanded. The jury decided against her, and judgment was rendered accordingly. No question is made as to the correctness of the verdict or the judgment upon it. As the paragraphs of the complaint are very lengthy, it would not be profitable to set them out in full, nor more in detail than we have done.

As we find no available error in the record, the judgment is affirmed, with costs.

Filed March 27, 1884.

No. 10,817.

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McCLELLAND, ADMINISTRATOR, v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

PRACTICE.—*Harmless Error on Demurrer.*—Error in sustaining a demurrer to a paragraph of a pleading is harmless, where the facts alleged therein are contained in a remaining paragraph.

SAME.—*Motion to Dismiss After Jury Retires.*—It is too late to ask leave to dismiss an action after the jury trying the same has retired to consult upon their verdict.

SAME.—*Court May Correct Erroneous Instruction.*—A trial court may rightfully correct an erroneous instruction, upon the return of the jury into court requesting that the instructions again be read to them.

RAILROAD.—*Negligence.—Injury to Drunken Passenger.—Notice of Condition and Whereabouts.*—A drunken passenger upon a railway train was, owing

solely to his condition, carried past his destination, and then, failing to comprehend his liability to pay further fare or to get off the train, he was removed lawfully from the train by the conductor and assistants, and placed a short distance from the track. Subsequently he wandered upon the track, where he was run over and killed by another train at a point where those in charge of the latter train did not and could not see him in time to prevent the accident.

Held, that the railway company was not liable for his death, and was not chargeable with notice of his condition or whereabouts.

From the Monroe Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellant.

G. W. Friedley and *E. D. Pearson*, for appellee.

FRANKLIN, C.—This is a suit by appellant, as administrator of the estate of Isaac Brimmer, against appellee for the death of said Brimmer.

The complaint consists of seven paragraphs. A demurrer was sustained to the fourth and overruled as to the others. Issues were formed in the Lawrence Circuit Court, when the venue was changed to the Monroe Circuit Court, where a trial was had by jury, and a verdict was returned in favor of the defendant. A motion for a new trial was overruled and judgment rendered upon the verdict.

The errors assigned are the sustaining of the demurrer to the fourth paragraph of the complaint, the overruling of the motion for a new trial, and the overruling of appellant's motion to dismiss his cause of action.

It is unnecessary to copy the lengthy fourth paragraph of the complaint in this opinion. There could be no available error in sustaining the demurrer to it, for the reason that all the material facts that could have been proved under it were provable under the other paragraphs of the complaint, to which the demurrer was overruled; and appellant could not be injured by the sustaining of the demurrer to that paragraph.

The facts in this case, as shown by the record, are as follows: The deceased got on a passenger train on defendant's road at Campbellsburg and paid his fare to Mitchell. When the train arrived at Mitchell, it stopped, and the usual an-

nouncement of the station was made, but the deceased did not get off. In a short time it moved on with the deceased in his seat; when it had gone a short distance, a mile or over, the conductor of the train discovered that he was yet upon the train and went to him and discovered that he was drunk and in a stupefied condition; he aroused him up and asked him where he wanted to go, to which deceased made no reply; he then told him what the fare was to the next station if he wanted to go any further, to which the deceased still made no reply, but only laughed at the conductor, not appearing to comprehend the situation.

The conductor stopped the train and he and the brakeman led the deceased off of the train and set him down on the grass some feet to one side of the road, and left him there sitting up. In a short time afterwards a freight train on the defendant's road, which the passenger train had passed at Mitchell while standing on the side-track, came along following the passenger train. The deceased, in the meantime, had got upon the track of the road and was lying down on it. When he was discovered by the engineer of the freight train, in that condition, distinct enough to distinguish that the object was some person, he then blew the whistle, and those in charge of the freight train endeavored to stop it, but it was too late, the train ran upon the deceased and killed him.

The motion for a new trial contains nine reasons. The first three are in relation to the sufficiency of the evidence. All the others are in relation to the instructions, except the ninth, which is for overruling the motion to dismiss.

Appellant in his brief makes no special point upon the sufficiency of the evidence otherwise than as mixed up with his discussion of the general tenor of the instructions. And he makes this general proposition, covering the theory of the instructions asked by him and refused to be given, in contradistinction to those given by the court: That the conductor and managers of the passenger train, at the time they left the deceased by the side of the road, well knew his helpless con-

dition; that their knowledge of his condition was notice of that fact to the defendant, as a corporation, and all its employees; hence the employees in charge of the freight train at the time they left Mitchell were chargeable with notice of the position and condition of the deceased, and should have run careful enough to have stopped the train before it reached the deceased. Nothwithstanding appellant's extended argument upon this proposition we can not see any good reason for its maintenance. Notice is not to be presumed where the facts show that it was impossible for it to exist by any human agencies, unless the law expressly makes it so. And we know of no principle of law that will charge the managers of the freight train with notice that the deceased had got upon the track, before they saw him there, or had any information of his being there, and that required them to run slow enough to stop before they reached him. We see no negligence in the managers of the freight train that would justify the giving of the instructions asked.

Under the circumstances, the conductor of the passenger train had the right to put deceased off the train, and place him far enough to one side so as to be out of danger from passing trains, without some intervening agency. The conductor could not be expected or required to place a guard over him to prevent his getting upon the track; and his afterwards getting upon the track, and lying down there, could not be the natural and necessary or usual result of his having been left by the side of the road, or his death the proximate result of his having been so left. He was bound to be left on one side or the other of the road, and if he afterwards wandered upon the track it was his own folly, resulting from his unfortunate condition, for which the defendant ought not to be held responsible. The instructions asked and refused, and those given, are too long and numerous to copy in this opinion.

We think the instructions given fully and fairly presented to the jury the law as applicable to the case. And as to the

instructions asked and refused, what were correctly asked were substantially given by the court either in its own instructions, or the ones given of those that were asked, and there was no error in refusing to give those which were incorrect.

There is a bill of exceptions in the record showing that after the cause had been submitted to the jury, and they had retired to deliberate upon their verdict, they again returned into court and asked to have the instructions again read to them, which was done by the court; that during the reading the court materially modified and changed instruction No. 22, and ordered the jury to again retire to consider of their verdict. The jury were directed to retire from the room, and, when absent, the plaintiff moved the court for leave to dismiss his cause of action, and asked leave to take a nonsuit, to which the defendant objected, and the court overruled the motion, which ruling is complained of as a last reason for a new trial.

As to a modification and change of the instruction the record nowhere shows what it was. Whether the instruction No. 22 asked by the defendant, and given by the court, as it appears in the record, is in its modified and changed form, or as originally given, we can not tell. Considering it in its recorded form, we see no error in it. But no complaint is made as to the correctness of the modification; the objection is only as to the fact of a change. It is not error to correct an instruction.

As to the overruling of the motion to dismiss: The 333d section of R. S. 1881 provides that the plaintiff may dismiss his action any time before the jury retires. And in all other cases the decision must be upon its merits. See the cases of *Dunning* v. *Galloway*, 47 Ind. 182, and *Holland* v. *Johnson*, 51 Ind. 346.

In this case the cause had been submitted to the jury, and they had retired to consider of their verdict before the plaintiff moved for leave to dismiss his cause, or take a nonsuit,

and it makes no difference if the jury had returned and heard the instruction re-read. After the jury had retired a second time to deliberate upon their verdict, under the above statute, the defendant had the right to insist upon a verdict on the merits of the cause, and there was no error in overruling plaintiff's motion to dismiss, nor in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed March 27, 1884.

No. 8669.

BARTLETT v. THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY.

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PRACTICE.—*Harmless Error.—Demurrer.*—Where it appears by the record that a pleading was found to be untrue, the Supreme Court will not consider whether there was error in overruling a demurrer to it.

RAILROAD.—*Common Carrier.—Pleading.—Variance.—Practice.*—Where a complaint against a common carrier of goods, for failure to deliver goods promptly, counts upon a mere common law liability, and the evidence shows that the goods were received under a special written contract, the variance is fatal, and in such case the overruling of a demurrer to an answer is a harmless error.

SAME.—*Negligence.—Special Contract.*—The common law liability of a common carrier may be limited by special contract, except such as results from the carrier's negligence.

SAME.—*Liability for Delay in Shipment.—Riots.*—Suit by a shipper against a railroad company, on a special contract for the shipment of live hogs, whereby the shipper in terms assumed the risk of delay in transportation. It was alleged in the complaint that before entering into the contract riots existed, hindering the movement of freight, of the extent of which the shipper, being ignorant, applied to the agent of the defendant at L. to learn if the defendant would ship live hogs thence to East Liberty, notwithstanding the riots; that the defendant, knowing the extent of the riots, by its agent, handed to the plaintiff a copy of a general order of the defendant, authorizing its agents to receive and for-

ward such property, whereupon the special contract was entered into and the hogs shipped for East Liberty under it; that upon reaching Columbus, Ohio, they were stopped by reason of riots, and delayed ten days, unloaded, kept in unhealthy pens, whereby they died, lost weight, etc. Another paragraph differed only in averring that the defendant's employees abandoned the train and were engaged in the riot in consequence of a reduction of their wages. Another was also similar save that it was silent as to the general order to receive and ship such property and as to the riots, averring a failure to deliver the hogs at East Liberty within a reasonable time; that there was ten days' delay at Columbus, whereby, etc. Answer: 1. That on arrival at Columbus there was a riot at East Liberty beyond the power of the authorities to suppress, destroying the defendant's railroad, depots and cars, making it impossible safely to take the hogs to East Liberty; that the delay at Columbus was necessary during the riot; that the defendant's servants were not engaged in the riot; that the hogs were properly unloaded and cared for at Columbus; that they died from disease contracted before delivery for shipment; and that there was no riot when they were received for shipment. 2. That by reason of riot, not by defendant's employees, it was unsafe at the time to carry beyond Columbus; that within twenty-four hours after the riot ceased the hogs were delivered at East Liberty; that at Columbus they were unloaded and cared for by the plaintiff; that those which died were diseased when shipped. 3. Same as the second, with the averment that there was no negligence of the defendant.

Held, that each paragraph of the answer was good, showing that the delay was not caused by any negligence of the defendant.

PRACTICE.—*Judgment on Facts Found, Notwithstanding General Verdict.*—Unless there be a motion below for judgment on the jury's answers to interrogatories, notwithstanding the general verdict, no question concerning the right to such judgment can arise in the Supreme Court.

HARMLESS ERROR.—*Evidence.*—The rejection of admissible evidence, which it is clear would not have changed the result, is a harmless error.

From the Henry Circuit Court.

M. E. Forkner, for appellant.

J. H. Mellett, E. H. Bundy, W. D. Foulke and *J. L. Rupe*, for appellee.

HAMMOND, J.—This was an action by the appellant against the appellee to recover damages occasioned by delay in the shipment of hogs from Lewisville, this State, to East Liberty, Pennsylvania. The complaint was in six paragraphs; the answer was in fifteen paragraphs, of which the first and tenth

were general denials. There was a reply in denial and also by affirmative paragraphs. A trial by jury resulted in a verdict for the appellee. Judgment was rendered on the verdict over the appellant's motion for a new trial and exceptions. The consideration of alleged errors will be confined to those discussed in the appellant's brief.

The appellant demurred for the want of facts to each of the special paragraphs of answer. The demurrer was sustained to the second, third and fourth paragraphs and overruled as to the others. Complaint is made as to the overruling of the demurrer to the fifth, eighth, ninth, eleventh, thirteenth and fourteenth paragraphs of the answer. The jury, in answer to interrogatories, found specially that the facts relied upon as a defence in the fifth and eleventh paragraphs of answer were not true. This rendered the overruling of the demurrer to those paragraphs harmless, even if such ruling was erroneous. A party has no ground of complaint to the overruling of his demurrer to a pleading if, upon trial, it affirmatively appears, from the record, that the pleading was found not to be true. *State, etc.*, v. *Julian*, 93 Ind. 292.

The first paragraph of the appellant's complaint alleged that, on July 21st, 1877, the appellant delivered to the appellee, a common carrier, 265 head of hogs at Lewisville, to be transported and delivered to the appellant at East Liberty, within a reasonable time; that appellee failed to do this, but carried the hogs to Columbus, Ohio, an intermediate station, and there delayed and kept them in pens, in unhealthy places, for twelve days, whereby fifty-eight died and the remainder shrank in weight, etc., to the appellant's damage, etc. The ninth paragraph of answer was addressed to the first paragraph of the complaint. The first paragraph of the complaint, as will be observed, was based upon the appellee's liability as a common carrier, and not upon any written contract. But it was shown in evidence, and specially found by the jury, as a fact in their answers to interrogatories, that the shipment of appellant's hogs was made

under three written contracts. It is settled by the decisions of this court, that where suit is brought against a common carrier to recover damages for the non-delivery of goods received by it for carriage, and the complaint merely alleges a breach of the common law duty of such carrier, if the evidence shows that the goods were received for carriage under a special written contract, which was not declared upon, the variance is fatal and the plaintiff can not recover. *Indianapolis, etc., R. R. Co.* v. *Remmy*, 13 Ind. 518; *Jeffersonville, etc., R. R. Co.* v. *Worland*, 50 Ind. 339; *Lake Shore, etc., R. W. Co.* v. *Bennett*, 89 Ind. 457; *Hall* v. *Pennsylvania Co.*, 90 Ind. 459. As the appellant could not, in any event, under the evidence, have recovered upon the first paragraph of his complaint, the overruling of a demurrer to an answer thereto was an error, if any, which did the appellant no harm.

The eighth paragraph of the answer was addressed to the first, fourth, fifth and sixth paragraphs of the complaint. So far as it was intended as an answer to the first paragraph of the complaint, it is disposed of by what is said above respecting the ninth paragraph of answer. The thirteenth and fourteenth paragraphs of answer were directed to the fourth, fifth and sixth paragraphs of the complaint.

The fourth paragraph of the complaint charges that prior to the shipment of the hogs riots existed on the appellee's road, interfering with the movement of freight, and the appellant, being ignorant of their extent, applied to the appellee's agent at Lewisville, on July 21st, 1877, to ascertain if the appellee would ship his hogs from that place to East Liberty, nothwithstanding said riots, and that the appellee, knowing the extent of said riots, delivered, by its agent, to the appellant a copy of a general order of the appellee addressed to its agents as follows:

"RICHMOND, IND., July 20th, 1877.

"ALL AGENTS—You can now receive and forward stock and perishable freight for Pan-Handle and East *via* P. R. R.

(Signed) "J. F. MILLER."

It is averred that upon receiving the above order, the appellant, by his agent, Thomas W. Hall, executed to the appellee the following written agreement:

"The undersigned hereby contracts, agrees and binds himself, and for the owners of the stock shipped in cars Nos. 5171, 4371, 5041, on the P., C. & St. L. R. R., at Lewisville, Indiana, station, on the 21st day of July 1877, to be transported to East Liberty by the Pittsburgh, Cincinnati and St. Louis Railway Company, in consideration of the said company agreeing to transport the said stock at the special rates and conditions given in local tariff, to load, unload, feed, water, and attend to the stock himself; and having examined the cars, to assume all risks of transportation, both as to the stock and the individual who may travel with such stock to attend to it, being all risks arising from any defect in the body of the cars, imperfect doors and fastenings, overloading, or from vicious and restive animals, delays, and all risk of the escape and robbery of any portion of said stock, or of loss or damage from any other cause or thing not resulting from defective trucks, wheels or axles. And it is hereby acknowledged that 24,000 pounds is the maximum weight allowed by the railroad company to be loaded in any one car. It is agreed that the company shall not be responsible for any delays at terminal points, nor for delays at points where stock is to be delivered to connecting lines, caused by their refusal or inability to receive it, after a tender of delivery has been made by this company. Signed at Lewisville, this 21st day of July, 1877.

"Witness: J. B. GUERIN.

"T. W. HALL."

It is averred that on the faith of the said order the appellant shipped 265 hogs under said contract; that the appellee did not carry the hogs to East Liberty within a reasonable time, but transported them to Columbus, where they were stopped by the riots, unloaded, placed in unhealthy pens, and there kept for twelve days by the appellee, being ten days

longer than usual, whereby sixty of the hogs died and others lost in weight, etc.

The fifth paragraph of the complaint is the same as the fourth, with the additional averments, that at Columbus the appellee's employees abandoned the train and uncoupled the cars; that there was a riot which originated between the Pennsylvania Railroad Company and the appellee on the one side and their employees on the other, and was occasioned by a reduction of wages; that appellee's employees were engaged in the riot; and that by reason thereof there was a delay of twelve days at Columbus.

The sixth paragraph of the complaint is the same as the fourth, except that the allegations as to the riot and the order signed by Miller are omitted; the breach averred being that the appellee did not within a reasonable time transport said hogs to East Liberty, but carried them to Columbus and placed them in unhealthy pens for ten days, etc.

The eighth paragraph of the answer alleges that the appellee, within a reasonable time, carried the hogs to Columbus; "that at the time of the arrival of the train of the defendant containing said hogs at said Columbus, there was a violent, forcible and tumultuous riot prevailing at said city of East Liberty, to such an extent that the same was beyond the power and control of the civil and military authorities;" that the rioters were engaged in the destruction of the appellee's property, including its road-bed, depots, and rolling stock, so that it was unsafe and impossible to deliver the appellant's hogs at said East Liberty; that the rioters were not the agents or servants of the appellee; that by reason of the riot the appellant's hogs were necessarily detained at Columbus during the riot, which continued five days, and also detained seven days thereafter on account of the accumulation of freight; that the hogs were unloaded and put in pens and properly taken care of; that fifty-eight of them died from disease contracted before they were delivered to the appellee and from natural causes, without the fault or negligence of the appel-

lee; and that the riot was not in existence when the hogs were received by the appellee for shipment.

The thirteenth paragraph of the answer alleges the transportation of the hogs to Columbus, an intermediate station, within a reasonable time; that upon their arrival there was a riot at East Liberty and Columbus; that prior to the shipment, as was then known to the appellant, there was a riot, but not such as to prevent the running of the appellee's trains; that by reason of the riot it was unsafe to proceed further than Columbus; that within twenty-four hours after the riot was subdued the hogs were delivered; that the fifty-eight hogs which died at Columbus were sick and diseased when shipped; and that the hogs were unloaded, fed and cared for by the appellant, as it was his duty to do under his contract of shipment.

The fourteenth paragraph of the answer is substantially the same as the thirteenth, except that it avers that the hogs died from disease contracted before shipment, and from natural causes, and not by the appellee's negligence. This paragraph, as well as the thirteenth, averred that the rioters were not employees of the appellee.

The appellant's counsel, in his brief, in reference to the fourth and fifth paragraphs of the complaint, says: "The theory upon which they were drawn, and what I now contend for them, is, that the legal effect of the contract of shipment, and the written order of the company delivered by defendant's agent to plaintiff, construed together in the light of the relative conditions and contract of the parties, was that the defendant assumed the risk of the delay and damage by reason of said riot; and that having caused the plaintiff to ship his hogs by the assurances or said order, the defendant is now estopped from claiming any immunity from damage occasioned by delay in consequence of said riot. The defendant answered by the thirteenth, fourteenth and amended eighth paragraphs of answer. In these pleas it pleads the riots as an excuse and justification for the delay. They are bad, for the reason

that under the complaint to which they are pleaded, the appellee assumed the risks of said riots, and is estopped from claiming anything by reason of them, as above stated."

We do not think that the order and contract referred to are susceptible of the construction contended for. The order of Miller to the appellee's agent, a copy of which was delivered to the appellant, simply authorized such agents to receive for shipment live-stock and perishable property.

The appellant, according to the fourth and fifth paragraphs of the complaint, knew of the existence, but not of the extent of the riots. With this knowledge, he, by his agent, executed the contract whereby he assumed certain risks, among them, delays of transportation. Taking the order and contract together, in the light of the surrounding circumstances, their obvious meaning was that the appellee accepted for shipment the appellant's hogs, he assuming the risks referred to. One of these risks was that of the delays complained of.

We do not think that any reasonable construction of the order and contract would lead to the conclusion that the appellee, in the shipment of the hogs, intended to insure against losses from delays in transportation, occasioned without its fault or negligence. Indeed, the strict liability of common carriers, where they are without fault or negligence, does not seem to extend to losses from delays in transporting live-stock and perishable property, though such delays are not caused by the act of God or the public enemies. *Pittsburgh, etc., R. W. Co.* v. *Hollowell*, 65 Ind. 188 (32 Am. R. 63); *Pittsburgh, etc., R. R. Co.* v. *Hazen*, 84 Ill. 36; S. C., 25 Am. Rep. 422. But even if such liability existed in the absence of contract, it is settled that a common carrier may, by express contract, relieve itself from its common law liability except as to consequences of its own negligence. *Adams Ex. Co.* v. *Reagan*, 29 Ind. 21; *Adams Ex. Co.* v. *Fendrick*, 38 Ind. 150; *St. Louis, etc., R. W. Co.* v. *Smuck*, 49 Ind. 302.

In the present case, it does not become necessary for us to decide whether the appellee, in the absence of a contract limit-

ing its real or supposed common law liability, would be responsible for the losses complained of by the appellant, if such losses were in no way attributable to its fault or negligence. The appellant shipped his stock under an express contract which relieved the appellee from liability in consequence of delays in transportation, and it is not liable for losses occasioned by such delays, if it was without fault or negligence itself.

The facts specially pleaded in the 8th, 13th and 14th paragraphs of the answer are sufficient to show that the delays and consequent losses occurring in the shipment of the appellant's hogs were not the result of the appellee's fault or want of care. These paragraphs of answer were good, and there was no error in overruling the demurrers thereto.

It is insisted by counsel for the appellant, that, under the facts specially found by the jury in answer to interrogatories, he was entitled to judgment for $687.50, notwithstanding the general verdict in favor of the appellee. The facts specially found by the jury do not appear to us to be inconsistent with their general verdict; but if the inconsistency contended for existed, and if the appellant, by the proper motion, had been entitled to judgment on the special findings, notwithstanding the general verdict, we could not, on this ground, reverse the judgment. The question whether a party is entitled to judgment on special findings, in the face of the general verdict, is only presented by motion therefor in the trial court. *Toledo, etc., R. W. Co.* v. *Craft*, 62 Ind. 395; 1 Works Pr., section 864. No such motion was made in this case.

The order signed by Miller, directing the appellee's agents to receive and forward stock, etc., was offered in evidence by the appellant, but its introduction was not permitted by the court. As a part of the transaction of the shipment of the appellant's hogs, no very good reason occurs to us for its exclusion from evidence. At the same time, however, we are

unable to see how the appellant was harmed by the ruling. The order, at most, when delivered to the appellant, was simply a declaration by the appellee of its willingness to receive and forward his stock. That it did receive and forward it is a fact not in dispute. As already adverted to, there was nothing in this order that in any way qualified the contract of shipment.

The evidence tended to show that the hogs were shipped in five cars; that by direction of the appellant's agent, T. W. Hall, three of the cars were consigned to said Hall, one car to J. W. Dennis and one to H. P. Gough. Dennis and Gough, at the time of shipment, each executed to the appellee a contract exactly like that executed by Hall. These contracts were put in evidence by the appellee over the appellant's objection. It is insisted that it does not appear from the evidence that Dennis and Gough were agents of the appellant, with authority to execute these contracts. Their agency, however, we think was sufficiently shown from the circumstances of the transaction, to warrant the court in admitting in evidence the contracts referred to.

Complaint is made of the submission of certain interrogatories to the jury, and of the refusal of the court to require the jury to make their answers to the interrogatories more specific. It would add unnecessarily to the length of this opinion to examine each question and answer alluded to; and it is sufficient to say, generally, that we are satisfied that no injustice was done in any of the respects named.

It is claimed that the verdict of the jury was not sustained by sufficient evidence. The facts specially found by the jury in answer to interrogatories were substantially as follows:

The appellant, by his agents, executed the three written contracts, introduced in evidence, dated July 21st, 1877, and signed, respectively, by Hall, Dennis and Gough; that Hall told appellee's agent at Lewisville, to consign one load of hogs to Dennis and one to Gough; that the agent did this,

and Dennis and Gough signed the two contracts bearing their signatures; that the appellant was not the owner of the hogs referred to in the contract signed by Dennis, but was the agent of the owner thereof; that about thirty hogs died out of the three car loads mentioned in the contract signed by Hall, and ten in each car load consigned to Dennis and Gough; that the hogs were detained at Columbus by reason of the riots at Pittsburgh and along the line of the appellee's road, obstructing the running of trains; that the riots were of such magnitude that it was impossible for the appellee to suppress them or move its trains; that the appellee carried the appellant's hogs as far as Columbus on the road to East Liberty within a reasonable time; that at the time of the arrival at Columbus there was a tumultuous riot at Pittsburgh, engaged in the violent destruction of property, which the civil and military authorities were unable to suppress, and which riot rendered it unsafe to ship the appellant's hogs to East Liberty prior to the time they were actually sent; that the appellant knew by newspaper reports at the time the hogs were shipped that a riot was in progress at Pittsburgh; that Columbus was the most suitable place for the detention of the appellant's hogs; that the hogs were moved to East Liberty as soon as practicable after the riot was over, and the road cleared away; that the delay at Columbus was occasioned by forcible resistance from mobs; that the appellee at all times during the riot had a sufficient number of servants and employees to man and operate its trains, and sufficient rolling stock to ship the hogs to East Liberty; that appellant's hogs were not diseased when shipped; that considering the circumstances of the riot and consequent obstruction, twelve days was a reasonable time in which to deliver the appellant's hogs; that Hall necessarily expended $100 in taking care of the hogs and himself at Columbus during the detention; that appellee did no negligent or wilful wrong by which damages were caused to the appellant; that fifty hogs were not delivered at East Liberty, weighing two hundred and fifty pounds each,

worth $5.50 per cwt.; that there was thirty pounds shrinkage in each of the hogs delivered at East Liberty.

The evidence tended to prove the foregoing facts, and also that all the hogs that were shipped from Lewisville arrived at Columbus, and that all that were shipped at Columbus arrived at East Liberty; that the hogs which did not arrive at East Liberty died during the delay of ten days at Columbus; that while so delayed the hogs were cared for, under the direction of Hall, the appellant's agent, by proprietors of stockyards, who were not engaged, nor in any way employed, by the appellee; and that some of the rioters had previously been in the employment of the appellee, but that such employment ceased when they engaged in the riot. We think that the verdict of the jury was sufficiently sustained by the evidence.

Complaint is made of the instructions of the court to the jury, but the questions of law thus involved have been considered in what has been said relating to the pleadings. We are of the opinion that the trial court, in its charges to the jury, correctly stated the law as applicable to the issues and the evidence.

Judgment affirmed, with costs.

Filed March 27, 1884.

No. 10,307.

JAMES ET AL. v. JELLISON.

94 292
157 658

INSURANCE.—*Marriage Benefit.—Wagering Contract.—Inseparable Consideration.*—A marriage benefit contract of insurance promised a certain sum of money to the payee, by a certain time, upon his marriage to a lady named, between certain dates, provided the payee gave the makers "the exclusive right to carry 'marriage benefit insurance' on him" and his intended.

Held, on demurrer to a complaint by the payee, against the makers, alleging performance, that the condition giving the makers such "exclusive right to carry" such insurance was a wagering contract, not separable from the other part of the consideration, and that, therefore, the whole contract is illegal and void.

From the Randolph Circuit Court.

W. A. Thompson, J. W. Thompson, A. O. Marsh, I. P. Gray and *P. Gray,* for appellants.

A. Vorhis, M. B. Miller and *J. E. Neff,* for appellee.

COLERICK, C.—This was an action brought by the appellee against the appellants, upon a contract, described in the complaint as follows:

"November 4th, 1881.

"On or before December 8th, after date, we promise to pay to Isaiah Jellison only one hundred dollars: *Provided,* Said payee is married on the 5th to 8th day of December, 1881, which marriage will be to us value received for this note; and *Provided,* Said payee gives us the exclusive right to carry marriage benefit insurance on him and Miss Lizzie Stead, whom he is to marry; failure to comply with above agreement annuls this obligation. J. D. JAMES.

"WILLIS WHIPPLE.

"J. E. HARKER."

The complaint consisted of two paragraphs. A demurrer was sustained to the first and overruled to the second. An answer of nine paragraphs was filed to the second paragraph of the complaint. A motion to strike out all of said paragraph except the first and ninth was sustained. The first paragraph of the answer averred that said contract was executed without any consideration whatever, and the ninth paragraph was a general denial. A reply of general denial was filed to the first paragraph of the answer, and the issues thus formed were submitted to a jury for trial, which resulted in the rendition of a verdict in favor of the appellee for $90, and over a motion for a new trial, judgment was rendered upon the verdict against the appellants, from which they appeal, and assign as errors:

1st. That the court erred in overruling the demurrer to the second paragraph of the complaint.

2d. That the court erred in striking out the second, third,

fourth, fifth, sixth, seventh and eighth paragraphs of the answer, and each of them.

3d. That the court erred in overruling the motion for a new trial.

The appellee, in the second paragraph of his complaint, after averring the execution by the appellants of the contract above set forth, alleges, "that said marriage benefit insurance was a valid and subsisting corporation for the purpose of paying premiums to persons who would get married, and for the purpose of enabling persons who would contract marriage to receive premiums, if application was made and certificates of insurance issued to the person who was to marry, or to any person who might make application in the name of the party who was about to marry, in case the marriage of the party was consummated; that he did, on the 8th day of December, 1881, marry Elizabeth Stead, known as Lizzie Stead, in compliance with his agreement, and that in further compliance with his agreement he gave the defendants the exclusive right to carry marriage benefit policies on himself and said Lizzie Stead; that he signed all the applications for marriage benefit insurance that the defendants presented to him to sign; that he did sign a large number of applications for the defendants which were necessary to enable them to procure said insurance policies, and for them to take out marriage benefit insurance on him; that the defendants did take out a large number of marriage benefit policies on him in his name, upon which the defendants received a large sum of money, to wit, $60; that plaintiff did in all things comply with his said agreement; that the defendants have wholly failed to comply with their said agreement or any part thereof." Wherefore he prayed judgment.

It is evident, by the provisions of the contract sued upon, and the averments in the complaint, that the appellants were merely interested in the consummation of the appellee's marriage so far as it would enable them to realize therefrom some

benefit by and through said insurance. If the condition set forth in the contract relating to said marriage had stood alone the promise of the appellants to pay to the appellee said sum of $100, upon his performing said condition, might probably have been enforced. See 1 Bishop Married Women, sections 785, 787. But the condition referred to was coupled with the additional one that the appellants should have the exclusive right to carry policies of marriage benefit insurance upon the appellee and the lady whom he was engaged to marry. These two conditions were firmly and inseparably united, and jointly constituted the consideration, which was an entire one, for the appellants' promise to pay said sum of money. The performance of one of the conditions, and a failure to perform the other, by the appellee, would not have entitled him to recover said sum of money, or any part of it, as the performance of both conditions was essential and indispensable to his right to recover upon the contract. In 2 Parsons on Contracts, p. 519, it is said: "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." That part of the contract sued upon which relates to said insurance is void, it being a wagering contract. See *Chalfant* v. *Payton*, 91 Ind. 202, where it was held by this court that such contracts are mere wagering contracts, and are void as against public policy. By the terms of the contract the consideration for the appellants' promise to pay said sum of $100 is entire, and not susceptible of apportionment, therefore, as the illegal part of the contract constituted some part of said consideration, and as the part which it constituted is so indefinite and uncertain as to render it incapable of being separated from the remainder of the consideration, the entire contract, by reason thereof, is rendered void, and, being executory, its performance can not be enforced. It has been held by this court that when the illegal and void part of the consideration of a note is so uncertain and

indefinite that it can not be separated from the legal and valid part, the whole note becomes invalid and void. *Hynds* v. *Hays*, 25 Ind. 31; *Everhart* v. *Puckett*, 73 Ind. 409. In Bishop on Contracts, section 471, it is said: "A contract illegal in part and legal as to the residue, is void as to all, when the two parts can not be separated; when they can be, the good will stand and the rest fall. One entire consideration can not, within this rule, be separated, though composed of distinct items, some of which are legal and others illegal." And in 1 Wait Actions and Defenses, p. 106, it is stated that "The general rule is, that if any part of an entire consideration for a promise, or of any part of an entire promise, is illegal, whether at common law, or by statute, the whole contract is void." The contract involved in this case is not embraced in any exception to the general rule to which we have referred, but is clearly within its provisions.

As the second paragraph of the complaint was founded upon an illegal contract, the performance of which, for the reasons herein stated, could not be enforced, the court erred in overruling the demurrer thereto, and for the error so committed the judgment must be reversed.

In view of the conclusion reached by us, it is unnecessary to consider the other questions presented in the assignment of errors.

PER CURIAM.—The judgment of the court below is reversed at the costs of the appellee, and the action is remanded with instructions to the court to sustain the demurrer to the second paragraph of the complaint, and for further proceedings in accordance with this opinion.

Filed March 29, 1884.

No. 11,227.

94 297
146 567

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. SHANKLIN.

RAILROAD.—*Killing Stock.—Fence.—Complaint.*—In a complaint against a railway company, for killing stock, it is sufficient to allege, on that point, that the place where the stock entered upon the track "was not fenced."

SAME.—*Time.—Demurrer.—Motion to Make Certain.*—A want of certainty as to time, in such complaint, is reached by motion to make specific, and not by demurrer.

SAME.—*Highway Crossing.— Abandoned Highway.— Instruction.*—Where, in such action, the defendant answers that it could not fence at the point where the stock entered on its track, because of a public highway crossing there, and there was evidence tending to show a previous abandonment of such highway, it was proper for the court to instruct the jury that if, at such point, such highway had been abandoned for over thirty years, it would be the same as though it had never existed.

SAME.—*Burden of Proof.*—As to instructions concerning the burden of proof upon each party, and as to the company's duty to fence, see opinion.

SAME.—*Company's Duty to Fence.*—If there be room to erect a fence between a railroad and an adjoining parallel highway, the railroad company is lawfully bound to fence.

From the Montgomery Circuit Court.

A. D. Thomas and *E. V. Brookshire*, for appellant.

G. W. Paul and *J. E. Humphries*, for appellee.

BICKNELL, C. C.—The appellee brought this action against the appellant to recover the value of two horses killed by the appellant's train of cars on the line of its railway.

A demurrer to the complaint, for want of facts sufficient, was overruled. The defendant answered in two paragraphs: 1. The general denial. 2. That at the place where the horses entered upon the railway the defendant could not lawfully fence its road, because there was a public highway there. The plaintiff replied, denying the second defence. The issues were tried by a jury, who returned a verdict for the plaintiff for $275; they also returned with their verdict interrogatories and answers thereto, which interrogatories they were required by the court, on motion of the defendant, to answer. The de-

fendant moved the court to require the jury to answer interrogatory No. 3 more fully. This motion the court overruled. The defendant moved for a new trial. This motion was overruled; judgment was rendered on the verdict; the defendant appealed. The following errors are assigned:

1. Overruling the demurrer to the complaint.

2. Overruling the motion for a new trial.

The complaint alleged that "where said horses got upon said track of defendant's railroad, the said track of said road was not fenced."

The appellant claims that the allegation should have been that the track was "not *securely* fenced," and that some day should have been named as the time when the road was not fenced.

These objections can not be sustained. The language of the statute, "not securely fenced," comprehends cases where there is no fence, and if the complaint was not sufficiently specific as to time, such a defect is not reached by a demurrer, but by a motion to make more specific. *Ohio, etc., R. W. Co.* v. *Collarn*, 73 Ind. 261.

The following were the reasons for a new trial:

1. The verdict is not sustained by sufficient evidence, and is contrary to the evidence.

2. The verdict is contrary to law.

3. Error in giving each of the instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, asked for by the plaintiff, and each of the instructions numbered 1, 2, 3, 4 and 5, given by the court of its own motion, and in refusing to give instruction No. 11, asked for by the defendant.

4. Error in refusing to require the jury to answer more fully interrogatory numbered 3.

The fourth of these reasons for a new trial is not discussed in the appellant's brief, and is, therefore, regarded as waived.

The first four of the instructions, given at the request of the plaintiff, stated, in substance, that a public highway may be abandoned by the public in whole or in part, and thereby

may cease to be a highway in whole or in part, and that if, at the place where the plaintiff's horses went upon the railway, there had once been a public highway, which had been abandoned by the public for over thirty years, then it would stand as if it had never been a highway. There was evidence to which these instructions were applicable, the chief controversy being whether there was a public highway where the horses went upon the railway. There was no error in these instructions. *Jeffersonville, etc., R. R. Co.* v. *O'Connor*, 37 Ind. 95.

The other instructions, given at the request of the plaintiff, relate to the duty of the defendant to fence its road. They state, in substance, that the burden of proof is on the plaintiff to show that the road was not fenced, and on the defendant to show that it was not bound to fence its road at that point; that a railroad company is not liable in such an action as this, if its road ought not to be fenced at the point in question, and is not bound to fence its road at highway crossings, nor at any place where such fencing would interfere with the rights of the public, or the proper management of the business of the railroad; and that if there is a highway running parallel with the railroad, then, if the defendant could have so fenced its road without such interference, by putting the fence even upon its own reservation, or by making cattle-pits at the proper places, it might be liable in an action of this kind if it had no such fence or cattle-pits.

We find no error in any of the instructions given by the court at the request of the plaintiff. *Wabash R. W. Co.* v. *Forshee*, 77 Ind. 158, and cases there cited. The appellant in its brief does not point out any error in the instructions given by the court of its own motion; therefore this part of the third reason for a new trial must be regarded as waived.

The eleventh instruction asked for by the defendant was refused. It was as follows, substantially: If the defendant's track and right of way, and the incidents thereof, occupied the whole of the public highway, still the easement of the public would remain, and the public having the right to use

such easement, the defendant could not lawfully fence its track so as to fence the public out from the right to use said easement. There was no error in refusing this instruction, so far as it asserted the rule that where the public have an easement the railway company can not obstruct such easement by fencing its road. That had already been more clearly asserted in the instructions previously given. We find no error either in giving or refusing instructions.

The first and second reasons for a new trial are that the verdict is not sustained by the evidence, and is contrary to law.

It appeared in evidence that going southward from the town of Linden there was once a highway, leading from Crawfordsville to Lafayette, and that upwards of thirty years ago the defendant was authorized by the proper county commissioners to take said highway for the site of its road for about two miles south of Linden, and about that time built its track upon the centre of said highway throughout said two miles, and has occupied the same ever since. There was evidence tending to show that such occupation made the highway impracticable, by reason of cuttings and filling and ditches, and because in some places the railroad occupied more than the entire width of the old highway, and there was evidence that the public had abandoned said two miles of highway many years ago, and had built another highway in its stead, about a mile westward, and that at the north end of the old highway a fence had been put across it, at the western end of which Mr. White, the owner of the land, had erected and maintained for his own convenience a private gate, through which he was in the habit of passing to some fields of his below; that some of the neighbors whose lands adjoined the railroad would occasionally travel along the railroad on foot and on horseback and with wagons, through White's gate, but not with buggies, owing to the roughness of the way, and that there was a wagon track along the railroad which began at the south end of said two miles, and went northward to White's gate, crossing the railroad four times, the last time

about half a mile south of White's gate, and it was shown that the horses entered upon the railroad track, on the west side of it, between White's gate and the first crossing of the wagon track below the gate, and there was evidence tending to show that even if this wagon track were a public highway there was ample room to fence between it and the railroad all the way from White's gate to said first crossing of the wagon track south of the gate, and that such fence, with a cattle-pit at the crossing, would furnish complete protection. The evidence, however, did not show that this wagon track was a public highway.

The jury, in answer to one of the interrogatories, had stated that the highway had been abandoned by the public, and that a gateway had been erected and used as aforesaid. No objection was made, alleging that this answer was not sustained by the evidence. There was evidence tending to sustain the verdict in every essential point; therefore it can not be disturbed. *Cooper* v. *Robertson*, 87 Ind. 222. There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed March 29, 1884.

No. 11,145.

LANMAN *v.* MCGREGOR ET AL.

94 301
126 597
94 301
142 53
94 301
144 53

SALE.—*Personal Property.—Cash on Delivery.—Conditional Sale.*—Where personal property is sold for cash on delivery, the sale is conditional, and the title to the property will not vest in the purchaser until the terms of the sale are complied with.

SAME.—*Sale by Conditional Vendee to Third Party.—Liability of Such Purchaser.*—Where, in such case, the conditional vendee of personal property, without the knowledge or consent of the vendor, and without compliance

with the terms of sale, re-sells such property to a third party, who converts the same to his own use, such third party acquires no title to the property as against the original vendor, and is liable to him for its value, or for the balance due him from his vendee on the agreed price.

From the Perry Circuit Court.

W. Henning and *S. B. Hatfield*, for appellant.

S. Joseph and *H. J. May*, for appellees.

HOWK, C. J.—The first error complained of by the appellant, the plaintiff below, in this cause, is the decision of the court in sustaining the joint demurrer of the appellees McGregor and Burst to the first paragraph of his complaint.

In this first paragraph the appellant, complaining of the appellees and one Thomas Lawrents, alleged that the appellees were partners under the firm name of McGregor & Burst, in timber and staves; that on the 12th day of March, 1881, the appellant sold conditionally to Thomas Lawrents and Andy Snyder all the timber suitable for making staves, at the rate of $3 per thousand, on the appellant's land in Perry county, by a written contract, a copy of which was filed therewith as a part thereof; that Andy Snyder afterwards, and before any timber was cut on the land, by consent of all parties to the contract, withdrew therefrom and transferred all his interest thereunder to Thomas Lawrents, who thus became the sole party of the second part to such written contract; that pursuant to and under such contract Thomas Lawrents cut, split and made out of the timber growing on said land sixty-five thousand staves, and stacked the same on the appellant's land; that the staves, when so cut and stacked, were worth at that time and place $8 per thousand; that the appellees were duly informed of the conditions upon which the title would vest in said Lawrents under the written contract, before they had purchased and paid for the staves, as thereinafter stated; that the appellees, intending to cheat and defraud the appellant out of the money due him for the staves, and to get them away without paying for the same, removed the staves from appellant's land, over his objections

and protests, and against his will, and without his consent shipped them off and converted them to their own use, and refused to pay therefor; that said Lawrents also failed and refused to pay for the staves as agreed on, and was wholly insolvent, and had not, at that time nor since, any property subject to execution; that there was due and unpaid to the appellant for the appellees the sum of $195; that at the time of the removal of the staves, and long before any money was paid to said Lawrents by the appellees, they were informed and well knew that the staves were the property of the appellant under said contract, and only pretended to purchase the same to cheat and defraud the appellant; that the appellees had not made full payment even to Lawrents for the staves, but still owed thereon more than $195; that said Lawrents requested the appellees to pay the appellant the said sum of $195, which they failed and refused to do; that it was intended and understood by and between the appellant and said Lawrents and Snyder, at the time said contract was executed, and it was intended by such contract that the title to and property in the staves, after they were made, should be and remain in the appellant until the sum of $3 per thousand was paid to him, and that upon such payment, and not before, the title thereto should vest in said purchasers. Wherefore, etc.

We are of opinion that the court clearly erred in sustaining the appellees' demurrer to this paragraph of appellant's complaint. By the express terms of the written contract, the appellant agreed to let Lawrents and Snyder have all the timber, suitable for making staves, on his real estate particularly described; and they agreed to work up all the timber on the land, that would make staves to advantage, and for all the good staves, made on the land, to pay the appellant three dollars per thousand. It was further stipulated in the contract, that the appellant should hold the staves made on the land until paid for. Fairly construed, this contract means, under the averments of the first paragraph of the

complaint, that the appellant sold his staves when made to Thomas Lawrents at an agreed price per thousand, upon the condition that Lawrents should pay therefor the agreed price, on or before delivery, and that, until payment of the price was made, there should not be a delivery of the staves to Lawrents, but the appellant should hold them as his property. The language of the contract is not as full, clear and accurate as it might have been; but we have given what we regard as a fair interpretation and construction of its terms, and the manifest intention and meaning of the parties thereto, in the execution of such contract.

Where personal property is sold for cash on delivery, the sale is conditional, and the title to the property will not vest in the purchaser until the terms of the sale are complied with. The allegations of the first paragraph of the complaint show that the staves in controversy were sold conditionally by the appellant to Lawrents, but were not to be delivered until the agreed price therefor was paid. It was alleged that the appellees were fully informed of the terms of the sale to Lawrents at the time they purchased the staves from him, but this allegation was not very material in this case. It is settled law, in this State, that where personal property is sold for cash on delivery, or where, as in the case at bar, by the terms of the contract, the vendor is to hold the property sold until paid for, the vendee acquires no title to the property which he can transfer, until the terms of the sale are complied with. *Evansville, etc., R. R. Co.* v. *Erwin*, 84 Ind. 457, and authorities there cited.

Where, in such a case, the vendee of the personal property, without the knowledge or consent of the vendor, sells the property to third parties, who convert the same to their own use, they acquire no title to the property as against the original vendor, and are liable to him for its value or, as in this case, for the balance due him from his vendee on the agreed price thereof. *Thomas* v. *Winters*, 12 Ind. 322; *Dunbar* v. *Rawles*, 28 Ind. 225; *Bradshaw* v. *Warner*, 54 Ind.

58; *McGirr* v. *Selt*, 60 Ind. 249; *Domestic Sewing Machine Co.* v. *Arthurhultz*, 63 Ind. 322.

"In the construction of contracts, the intention of the parties is chiefly to be considered, and that effect given to the contract, if not inconsistent with legal rules." We know of no legal rule which prevents us from construing the contract, in accordance with the manifest intention of the parties thereto, in the case in hand. Thus construed, there is no room for doubt, as it seems to us, in regard to the character of the sale of the staves in controversy, by the appellant to Lawrents. It was a conditional sale, and the conditions of the sale not having been complied with, the title to the staves remained in the appellant and never vested in the purchaser.

The first paragraph of the complaint stated a good cause of action against the appellees, and their demurrer thereto ought to have been overruled.

The judgment is reversed with costs, and the cause remanded with instructions to overrule the demurrer to the first paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

Filed Feb. 21, 1884. Petition for a rehearing overruled March 27, 1884.

No. 8785.

94 305
160 40

THE CITY OF TERRE HAUTE *v.* THE TERRE HAUTE WATER-WORKS COMPANY.

94 305
171 659

CITY.—*Power to Sell Water-Works Stock.*—A city incorporated under the general law of this State has the right to sell stock subscribed by it in the capital stock of a water-works company, and as an incident to decide upon the terms of sale.

SAME.—*Incorporation of Terre Haute.*—There is no provision in the law under which the city of Terre Haute is incorporated, nor in that under which the Terre Haute Water-Works Company is organized, prohibiting the city from selling stock subscribed by it in the capital stock of such company.

SAME.—*Power of Courts to Set Aside.*—Sales made by a municipal corporation, in the exercise of discretionary power, can not be annulled for the reason that the bargain was improvident.

SAME.—*City Officers Have no Power to Donate City Property.*—The officers of a city have no right to make gifts of city property.

From the Vigo Circuit Court.

C. F. McNutt and *J. G. McNutt*, for appellant.

W. Mack and *J. G. Williams*, for appellee.

ELLIOTT, J.—The questions presented by the first and third paragraphs of the appellant's complaint are the same, and may be thus stated:

First. Has a municipal corporation the incidental authority to sell stock subscribed by it in the capital stock of a water-works company incorporated under the laws of this State?

Second. Is there any provision in the law under which the city of Terre Haute is incorporated, or in the law under which the water-works company is organized, prohibiting the sale of such stock? Of these in their order.

We have no hesitation in holding that a municipal corporation may sell stock taken by it in a private corporation. The right to sell property not held for a public purpose is an incidental power inherent in all corporations, public or private, unless withheld by the law under which they were organized. *O'Boyle* v. *Shannon*, 80 Ind. 159; *Shannon* v. *O'Boyle*, 51 Ind. 565; 2 Dillon Munic. Corp. (3d ed.) 575.

The second question must be answered in favor of the appellee. We find no provision in the law for the incorporation of the city, or in the law providing for the organization of the water-works company, denying the right to sell the stock which the city is authorized to subscribe. Section 9 of the act to which counsel refer does not touch this question.

The authority of a private corporation to hold property can not be questioned by a municipal corporation; that is a right to be exercised by the State in a direct proceeding.

The authority to sell property implies authority to determine the terms of sale. Where a municipal corporation pos-

sesses authority to sell, it also possesses, as an incident to the principal power, the right to decide upon what terms the sale shall be made.

Where a discretionary power is conferred upon a municipal corporation courts will not interfere with its exercise. Sales made by a municipal corporation, in the exercise of a discretionary power vested in it, can not be annulled upon the ground that the bargain was an improvident one.

The second paragraph of the complaint avers that the $50,000 of stock subscribed by the city was "donated" to the appellee. In our opinion, the officers of a municipal corporation have no right to make gifts of corporate property. They are not the corporation, but are only its agents entrusted with specific official duties. They occupy positions of trust requiring of them fidelity to the corporate interests and prohibiting them from making gifts of trust property. It is easy to conceive that gross abuses and shameful misbehavior might result if corporate officers were permitted to give to those they chose to favor the property of the municipality. Long settled principles of law are arrayed against the authority of one occupying a position of trust to deprive the person, natural or artificial, whom he represents, of his property by bestowing it as a mere gift upon some person chosen by himself as the recipient of the bounty.

It was not necessary to set forth an order of the common council making the gift, for the action does not rest upon a contract or a written instrument. The gravamen of the complaint is the wrongful breach of duty in bestowing a gift of corporate property upon a party who had full knowledge of all the facts. The case of *City of Terre Haute* v. *Lake*, 43 Ind. 480, is not in point.

Judgment reversed, with instructions to overrule the demurrer to the second paragraph of the complaint.

Filed March 28, 1884.

No. 10,346.

RILEY ET AL. *v.* KEPLER.

94 308
155 264

PROMISSORY NOTE.—*Administrator's Fraud in Selling Land.*—Fraudulent representations by an administrator, that the land was free from encumbrance and the title perfect, made by him at a sale of his decedent's land to pay debts, are no defence to an action upon a promissory note executed for unpaid purchase-money of said land.

SAME.—*Tax Sale.—Pleading.*—A pleading setting up a sale for taxes as the basis of a title or encumbrance, but not alleging facts showing the taxes to have been a valid lien, is insufficient.

SAME.—*Mortgage.*—A pleading alleging, as a defence, an adverse outstanding recorded mortgage, but showing neither that the mortgage is unpaid, nor that the defendant's possession has been disturbed, is bad.

From the Hancock Circuit Court.

R. A. Riley and *R. A. Black*, for appellants.

C. G. Offutt and *G. Barnett*, for appellee.

FRANKLIN, C.—Appellee, Kepler, as assignee of one Ryan, administrator of the estate of Joseph Williams, deceased, brought this suit against appellants on two promissory notes for $100 each, bearing date July 19th, 1879, executed by appellant Martha C. Riley and one W. J. Lukins.

The notes were executed to the administrator for the purchase of real estate sold by him as such to pay the debts of said estate, the widow of Williams uniting in the sale, and were payable in twelve and eighteen months after date. The purchase was for $300—$100 of which was paid at time of purchase, and $75 more had been paid upon the first note due.

Issues were made, a trial had before the court, which resulted in a finding and judgment for the appellee for the balance on the notes, interest and attorney fees.

Various errors have been assigned in this court. Appellants, in their brief, have presented and discussed but one of the specifications of errors; the others are considered as waived.

The specification of error insisted upon is the sustaining of appellee's demurrer to the second paragraph of appellant Martha's answer.

This paragraph of answer substantially states that the notes were executed for the balance of the purchase-money for the real estate, and then proceeds to aver that said Ryan, "when said property was offered for sale, just before and at the time the auctioneer commenced and was crying the sale of said property, gave assurance and guaranties to this defendant that the title to said property was perfect, and that it was free and clear from any and all liens and encumbrances," and that they had full right, authority and power to convey the same free and clear of all encumbrances, and would do so to the purchaser thereof; that the defendant relied upon said assurances and guaranty; that the defendant then had no opportunity to examine the title to said real estate, and bid the same off at the sum of $300; that she complied with the terms of the sale by paying $100 at the time, and executing the notes in suit for the balance of the purchase-money, and has since paid $75 on the first note due; that Lukins signed the notes as her surety; that said Ryan, as such administrator, and said widow did not execute to her a warranty deed for said real estate, but a deed without covenants of warranty; that the title to said real estate was not then clear, perfect and unencumbered, and that they had no right or authority to so convey the same; that said real estate was then encumbered with a tax lien for delinquent taxes for the years 1878 and 1879, and the same had been then sold for taxes, for $18, to one Peter Kepler Boyd; that there was then a mortgage on said real estate, dated March 16th, 1866, to secure the payment of a note for $300; that the same was duly recorded March 17th, 1876, and remains of record unpaid, uncancelled and unsatisfied; that said mortgage is a prior lien, and for a larger sum than the amount remaining due on said notes sued on; that about the 18th day of October, 1879, said administrator and said widow delivered said deed to her, which is made a part of the paragraph of answer; that relying upon the promises, assurances and guaranty that they would make a clear warranty deed to her, she took the same at their word,

without examining it, and placed it on record; that at the time she purchased said land and accepted said deed, she had no notice, knowledge, information or belief but that said title was clear and unencumbered, and that said deed was a proper warranty deed; that she did not discover until long after she had paid the first instalment and $75 on one of said notes, to wit, for more than a year after said sale to her, the existence of said liens; that after she so discovered the same, she notified plaintiff and his said assignor to release and satisfy the liens, and that they utterly failed and refused to remove said liens and encumbrances; that all the facts and averments herein stated were fully known by the plaintiff before the assignment of said notes to him. Wherefore the consideration of said notes in manner and form aforesaid has wholly failed, and the defendant demands judgment, and all other proper relief.

Appellants' counsel, in their argument, treat this paragraph of answer as one of fraud instead of failure of consideration. It is doubtful whether sufficient facts are alleged to constitute fraud.

There is no allegation that any delinquent taxes were actually due on the land. The mere allegation that the land was sold for taxes is not sufficient; the facts showing a valid lien upon the land for taxes should be averred. And the averment that the mortgage was duly recorded and remained of record unpaid, uncancelled and unsatisfied, does not necessarily imply that there was anything remaining yet due upon the mortgage. It may have been fully paid without the record showing the payment; and in that case would be no lien upon the land. There is no averment of any damage on account of the alleged fraud; she does not show that she has been disturbed in the possession of her premises, has paid anything on account of encumbrances, or that any attempt has been made to enforce any encumbrance; without showing an injury there can be no available fraud. But if the paragraph was properly constructed as a plea of fraud, it could not be a good defence in this action.

The notes sued on were executed to the administrator in his fiduciary capacity for property belonging to the estate. The administrator, as such, could not commit a tort in the sale of the property. If he made false representations in the sale, that was his individual tort, for which he alone could be held individually liable. *Rodman* v. *Rodman*, 54 Ind. 444; *Hankins* v. *Kimball*, 57 Ind. 42; *Rose* v. *Cash*, 58 Ind. 278. The administrator's individual tort could no more be pleaded as a defence to the notes than could an individual claim against the administrator be pleaded as an offset to the notes; and not being admissible against the administrator, it could not be against the assignee.

There is no error in sustaining the demurrer to this paragraph of the answer. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed March 27, 1884.

No. 8799.

HAYES *v.* BURKAM.

FRAUD.—*Complaint.—Fraudulent Representations by Agent.*—Where, in an action against H. and others upon contract, the complaint alleges that the defendants, as obligors, agreed with the obligee that, to obtain from the latter the loan of U. S. bonds, they would execute their obligation to him, and that subsequently they had, through their agent, obtained the delivery of such bonds upon the false and fraudulent representations of said agent, that such obligation had been executed by the defendants, the complaint is insufficient, as against H., for want of an averment that at the time such bonds were so delivered he had not yet executed such bond.

SAME.—*Authority of Agent.—Evidence.—Principal and Surety.*—The fact that H. agrees to become surety upon a bond yet to be executed, pursuant to a loan negotiated by B., does not tend to establish an agency in B. to bind H. upon a parol contract on the same terms, by which B. subsequently obtained the loan.

SAME.—The fact that B. had authority to negotiate a loan as the agent of H. and others, by the terms of which they were to obtain such loan upon

executing an obligation to the person making the loan, would not authorize B. to subsequently obtain such loan upon his false and fraudulent representations that such obligation had been duly executed.

From the Ohio Circuit Court.

W. S. Holman, J. Schwartz, O. B. Liddell, T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and *E. Daniels*, for appellant.

A. C. Downey, G. E. Downey, J. D. Haynes and *J. K. Thompson*, for appellee.

NIBLACK, J.—This was an action by Joseph H. Burkam against the Lawrenceburgh Woollen Manufacturing Company, Levin B. Lewis, Ezra G. Hayes, Elijah S. Blasdel and Anson Marshall, the latter being the assignor of the cause of action and being summoned merely to answer as to his interest, if any, in the matter in controversy. For that reason reference hereafter made to the defendants in the action will be understood as not including him.

The complaint was originally in two paragraphs. Issues were formed upon these paragraphs between the plaintiff and defendant Hayes, and a trial resulted in a verdict and judgment for the plaintiff. That judgment was reversed by this court. See *Hayes* v. *Burkam*, 51 Ind. 130.

After the cause was remanded to the circuit court, the plaintiff assigned his interest in the action to William D. Burkam, who was substituted as plaintiff, and who, upon leave granted, filed an additional and third paragraph of complaint.

As the complaint then stood the first paragraph charged that on the 30th day of October, 1867, the defendants procured from Anson Marshall the loan of $10,000, par value, of 5-20 U. S. bonds, then of the value of $15,000, and then and there promised to return to the said Marshall like U. S. bonds of the same date and general description, at the expiration of one year from that time, which the defendants had failed to do; that the contract was reduced to writing and was to have been signed by all the defendants, but for reasons stated it was not signed by the defendant Hayes, which un-

signed writing was filed with the complaint as exhibit A. For further particulars as to this paragraph reference is made to the opinion in the case of *Hayes* v. *Burkam, supra.*

The second paragraph charged that on the said 30th day of October, 1867, the defendants borrowed from Marshall $10,000, par value, in U. S. 5-20 bonds, for the use of the Woollen Manufacturing Company, on the terms mentioned in the unsigned writing filed with the complaint; that the loan was obtained under the following circumstances: Blasdel, acting as the agent of the defendants, and having competent authority to do so, negotiated the loan on the joint credit of all the defendants, with the understanding that the contract was to be reduced to writing and to be signed by them and placed in the bank where the bonds were kept before such bonds were to be taken from the bank and delivered, but that Blasdel, as such agent for the defendants, with the knowledge of the defendant Hayes, took the bonds from the bank without the signature of Hayes to the contract as it was afterwards reduced to writing; that the defendants have failed to return said bonds, or to account for the same in any way, but have sold and converted the same to their own use, to the damage of the plaintiff.

The third paragraph charged the obtaining of the loan of 5-20 U. S. bonds substantially as stated in the preceding paragraphs; that the bonds were at the time on deposit in the First National Bank of Lawrenceburgh; that Blasdel acted as the agent of all the other defendants in all matters connected with the loan, having full authority so to do; that it was agreed that the bonds should not be delivered until the written obligation referred to in the preceding paragraphs should be signed by all the defendants; that Marshall thereupon made a written order on the cashier of the said First National Bank of Lawrenceburgh for the delivery of the bonds when the written obligation should be signed by all of the defendants, and not till then, and placed the same in the hands of his son, Firman Marshall, to be delivered when such obliga-

tion should be so signed; that the defendants thereafter falsely and fraudulently represented to the said Firman Marshall that the written obligation had been signed by all of them, and he, believing that said obligation had been so signed, and upon the faith thereof, caused said bonds to be delivered to the defendants by the cashier of the bank in which they were on deposit, as herein above stated; that the defendants had failed to return said bonds, or to pay the value thereof.

Hayes answered the third paragraph of the complaint:

First. In denial; *Second.* That the cause of action therein stated did not accrue within six years; *Third.* Payment.

A demurrer, for want of sufficient facts, was sustained to the second paragraph of this answer, and upon a second trial of the cause there was a general verdict for the plaintiff, assessing his damages at $9,500. Accompanying the general verdict were answers to numerous interrogatories submitted to the jury at the request of the parties respectively. A motion for a new trial being first denied, judgment was rendered against Hayes upon the general verdict.

The question of the sufficiency of the third paragraph of the complaint was indirectly raised by the demurrer to the second paragraph of the answer to that paragraph of complaint, and it is argued that the demurrer ought to have been carried back and sustained to this third paragraph of the complaint, because of its alleged insufficiency upon demurrer. *Fox* v. *Wray*, 56 Ind. 423; *Gould* v. *Steyer*, 75 Ind. 50; *Reed* v. *Higgins*, 86 Ind. 143.

The paragraph of complaint in question was, we think, defective in one material respect at least, and that is, it failed to aver that Hayes had not, in fact, signed the written obligation concerning which the alleged false and fraudulent representations were made by the defendants, at the time they obtained possession of the bonds through the agency of Firman Marshall. The averment that Hayes had not signed that obligation at some previous time was not sufficient to supply that omission.

It was made to appear by the evidence that Blasdel, at the time he entered into negotiations with Anson Marshall for the loan of the bonds, was, and for some time thereafter continued to be, the president and general business manager of the Lawrenceburgh Woollen Manufacturing Company, and that all he did in obtaining the loan was done primarily in the interest of that company, to the use of which the proceeds of the loan were intended to be, and were in fact, applied; also, that during the negotiation he was the bearer of propositions between the respective parties, other than himself, and that it was through his active exertions that an agreement as to the terms upon which the loan was to be made was reached, and that the bonds were obtained for the use of the company so represented by him. It was also made to appear at the trial that Hayes was not present when the bonds were delivered to Blasdel at the bank in which they had been previously kept, and did not personally participate in any of the alleged representations which induced Firman Marshall to authorize a premature delivery of the bonds to Blasdel.

The theory upon which the action was prosecuted was that in all matters connected with the negotiations for the loan, and with the measures taken to get premature possession of the bonds, Blasdel acted, also, as the agent of Hayes.

The question as to whether Blasdel did, also, so act as the agent of Hayes, and consequently whether Hayes was bound by the acts and declarations of Blasdel in connection with the negotiations and the procurement of the bonds, was made an important, and, indeed, the controlling, question at the trial.

As applicable to that question, and in connection with other matters to which the attention of the jury was directed, the court instructed the jury as follows:

"If you find from the evidence that the defendant Blasdel went to Marshall and ascertained that Marshall had the bonds, and that he would loan them to the defendants on certain terms and conditions, and that a part of the terms and conditions were that the Lawrenceburgh Woollen Manufacturing

Company, Blasdel, Lewis and defendant Hayes should give their bond to pay the bonds in one year, and that Blasdel truly stated to the defendants Lewis and Hayes the terms upon which Marshall would loan the defendants the bonds, and that Lewis and defendant Hayes agreed to the terms and consented to become so bound for the bonds and to give their bond for them, and that the bond was written out by Lewis and read to the defendant Hayes, and he agreed to sign it after it was copied by the secretary of said company, and that the bonds were obtained from Marshall upon the agreement of Hayes to execute such bond, this is evidence tending to show that Blasdel was acting as the agent of the defendant Hayes in negotiating the loan, but you should consider all the other evidence, if any, bearing on this point."

Through the medium of a subsequent instruction the court, continuing, said: "If you find from the evidence that the U. S. bonds were borrowed from Marshall, under a contract as set out in Exhibit A of the complaint, and find that it was further agreed for the defendant Hayes that the U. S. bonds would not be taken from the First National Bank of Lawrenceburgh, where they were on deposit, until said contract for their return was signed and executed by the defendant Hayes and left in a designated bank in Lawrenceburgh for safe-keeping for Marshall, and further find that without said contract being signed by defendant Hayes, and so deposited in bank, the U. S. bonds were taken by the agent of said Hayes and applied to the use and benefit of the Lawrenceburgh Woollen Manufacturing Company, said Hayes at the time knowing that Marshall was parting with his U. S. bonds in the belief, induced by the acts and representations of Hayes, that said obligation for their return was executed by him, then such taking of the U. S. bonds was without authority from Marshall, and wrongful, and you should find for the plaintiff without regard to the question as to whether Hayes was to execute the obligation as principal or surety."

In our opinion neither one of the instructions from which extracts are set out as above, stated the law correctly as applicable to the evidence adduced at the trial. In the first place evidence establishing the fact that Hayes had agreed to sign a contract which Blasdel was instrumental in negotiating did not tend to prove that Blasdel had been authorized by Hayes to bind the latter to a parol contract containing the same or similar terms and conditions. In the next place, conceding that Blasdel acted as the recognized agent of Hayes in negotiating the loan, that circumstance did not tend to prove that Hayes had subsequently authorized Blasdel to make false and fraudulent representations for the purpose of evading the terms and conditions upon which it had been agreed the loan was to be made. The presumption is that a principal does not authorize his agent to act wrongfully in an ordinary business transaction, and on the same principle authority conferred upon a special agent to do a lawful and particular thing can not be construed to authorize him to act wrongfully or fraudulently in connection with other business he may assume to transact in the name of his principal. In their application to the evidence, both of the instructions, to which special reference has been made, were in practical derogation of the doctrine announced by this court upon the former appeal, and were, for that reason, also erroneous.

Questions have been made in different forms upon the answers to some of the interrogatories addressed to the jury, but as the judgment will, in any event, have to be reversed, we need not review those answers in detail. It may be stated, however, in general terms, that some of the interrogatories referred to were too complex and necessarily confusing to the jury; that some of the answers were conflicting, and others indefinite and uncertain, and that the answers as a whole were of a character to impair confidence in the general verdict.

We have not noticed some objections urged to the several paragraphs of the complaint, for the reason, amongst others,

that the pleadings will probably be amended in some material respects before the cause will be again tried.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed April 1, 1884.

No. 11,196.

PIERSOL v. HUDSON.

From the Boone Circuit Court.

G. H. Goodwin, for appellant.

HAMMOND, J.—The appellee sued the appellant in the court below upon an account for money had and received and for money paid for the use and benefit of the appellant at his instance and request. Upon the issue formed by the general denial, the case was tried by a jury and resulted in a verdict for the appellee, upon which judgment was rendered over the appellant's motion for a new trial and exceptions.

The grounds upon which the new trial was asked were, that the verdict was not sustained by sufficient evidence, and was contrary to law, and because the damages assessed were excessive.

The evidence for the appellee clearly made out his case and authorized the amount of the recovery in his favor as found by the jury. The evidence was directly contradicted by that for the appellant. In such case, as has often been held by this court, we can not weigh the evidence to determine the correctness of the verdict. The verdict of the jury, having the approval of the trial court in its refusal of a new trial, can not, under the evidence as it comes to us in the record, be disturbed by this court.

Judgment affirmed, at appellant's costs.

Filed March 25, 1884.

No. 11,295.

THE CHICAGO AND WEST MICHIGAN RAILWAY COMPANY v. LINARD.

94 319
138 273
94 319
143 297

LANDLORD AND TENANT.—*Growing Crops.—Trespass.*—Where there is a lease for years, rent to be paid by delivery to the landlord of a certain share of the crops when mature, the crops while growing and before delivery are the property of the tenant, and he can maintain suit for trespass thereto even against one who purchases the land from the landlord.

SAME.—*Railroads.*—In such case, a grant by the landlord to a railroad company is no defence to a suit by the tenant for injury to crops growing on the lands so granted.

From the Laporte Circuit Court.

J. Bradley and *J. H. Bradley*, for appellant.

F. Church, for appellee.

ZOLLARS, J.—The appellee, in his complaint, filed on the 9th day of April, 1883, alleges, in substance, that on or about the 1st day of June, 1882, he was lawfully in possession of the land therein described, and was farming the same, and was the owner and had growing thereon a large quantity of corn, pumpkins and cornstalks, of great value; that the appellant was a railroad corporation duly organized and engaged in the construction of a railroad from the city of Laporte to Lacrosse in Laporte county, and that at the time mentioned, and at sundry times thereafter, the appellant wrongfully entered upon the said premises so in possession of the appellee, and being worked and farmed by him, and proceeded to locate and construct a railroad over and upon said premises, and destroyed and converted to its own use the crops thereon planted and growing on about twelve acres of the land so occupied by the appellee, of the value of $200, to the damage of the appellee, etc.

The appellant answered in two paragraphs. The first paragraph is a general denial.

The second paragraph alleges that at the time of the entry upon the land, one Charles F. Wells was the owner of the

land and in possession of it; that the appellant was engaged in the construction of a railroad as stated in the complaint, and located its railroad on and across the said land, and desired and intended, for the purpose of constructing and forever maintaining its railroad, side tracks, "Y" tracks and depots thereon, to appropriate so much of the said land as it lawfully might, and with the consent and under a parol license of the said Charles F. Wells, which had never been revoked, entered upon and appropriated that part of said lands particularly described in a deed of conveyance by the said Wells to the appellee, a copy of which deed is filed with and as a part of the answer; that with said consent and under said license, the appellant took possession of said land so described in said deed, and constructed its said railroad and appurtenances on the same, and has ever since been in possession of the same, and is now operating its railroad thereon, and did afterwards agree with said Wells upon the amount of compensation to be paid to him for the land so appropriated and taken and damage done, and paid the same to him in full, and thereupon the said Wells executed and delivered to the appellant the said deed of conveyance, which is dated on the 11th day of July 1882, and that they intended and agreed that the same should have relation to, and take effect from that date, and that the appellant did not commit any damage nor destroy any crops upon any part of said land other than the said parcels described in the said deed.

The issues were closed by a reply of general denial. There was a trial by the court, and a judgment for appellee. The motion for a new trial, on the ground that the finding is not sustained by sufficient evidence, and is contrary to law, was overruled. Appellant excepted, and prosecutes this appeal.

Omitting the portion in relation to the amount of damages, appellee's testimony was as follows:

"I was in possession of the land taken, at the time it was taken. I took the land upon which my crops were growing, that were destroyed by the Chicago and West Michigan Rail-

way Company, of Charles F. Wells, to work on shares. I was to give him one-half of all the corn raised, delivered on the place in the crib, and one-half of all the wheat raised in the half bushel. I did not live on the premises. The railway company took about ten or eleven acres of this land which was planted in corn. Part of it was taken in May or June, and the rest in August of the same year. * * * These crops were all taken or destroyed by the agents or servants of the railway company without my consent. The company entered upon the land without my consent. The company did not ask my consent, and I have never been paid for the damage."

On cross-examination the witness said: "I rented the land about two years before. The land is owned by Charles F. Wells, and was when the railway company entered upon it. I made the bargain with Theodore Wells, a brother of Charles F. Wells, who resided at Wellsboro, and is the agent for the Grand Trunk and the Baltimore and Ohio Railroads at that place. He was the agent for his brother, and had authority to let the land. I rented the land for six years to work on shares. I was to give the owner one-half of all the crops raised, and I was to have the other half. Wells's half was to be delivered to him, the corn in the crib on the place, and the wheat in the half bushel. I did not live on the place. There is no house on the place. The contract I made for the place was in writing. It never was recorded in the recorder's office of Laporte county. I have not got it with me. I do not know where it is. Have not seen it since it was written."

The appellant produced Edward Hawkins, who was sworn, and testified as follows: "I was acting as the agent for the Chicago and West Michigan Railway Company in 1882, in buying the right of way; the land farmed by Linard belongs to Charles F. Wells; I am acquainted with Theodore Wells; he claimed to be acting for his brother Charles F. Wells, the owner of the land in controversy; I entered into negotiations

for the purchase of the right of way for the railroad company; he said that they did not want the land condemned; that the company might go on and construct their road without condemnation proceedings being first had, and that the price to be paid could be agreed upon afterwards."

Theodore Wells, called by the appellant and sworn, testified as follows: "I am the brother of Charles F. Wells, the owner of the land that Linard farmed; Linard had the land on shares; he was in possession of the same; I let him have it as the agent of my brother; I gave the defendant company permission to construct its main track across the land, but said that they must pay Linard for his crops; I had a general power of attorney from my brother in relation to this land; have sold some parts of it and made deeds for it; the power of attorney has never been put upon record; I have not got it with me."

Appellee also introduced in evidence the record of condemnation proceedings. These proceedings were instituted in August, 1882. On exceptions filed by Wells, an appeal was taken to the circuit court. The proceedings were dismissed from that court in February, 1883. To this proceeding appellee was not a party. Appellant introduced a deed from Wells to the railroad company for the land taken and occupied by it. The deed bears date of July 11th, 1882. It was acknowledged on the 6th day of January, 1883. According to the averments of the answer, it was executed on this latter day, but by agreement of parties was to have effect as of the 11th day of July preceding.

The contention on behalf of appellant, as we understand counsel, is, that, as shown by the evidence, appellee was not in possession of the land as a tenant, but that his possession was the possession of the owner of the land; that appellee's interest was in and attached to the crops only, and that hence he can not maintain this action, which is in the nature of an action *quare clausum fregit*. In this contention they say:

"We claim that the evidence does show either that the ap-

pellee was, in relation to the crops raised, a tenant in common with the owner, having no right to claim any particular part of the crops until they were divided, or that he was the servant of the owner, having no right to any part of the crop as a compensation for his services until the same was delivered to him."

The contention further is, that as appellee is only a tenant in common, as above contended, he can not maintain this action alone, that the owner of the land should be joined with him, and, further, that the deed executed by the owner of the land operated as a release of all damages, and was conclusive upon appellee as a tenant in common of the growing crops.

We can not concur with counsel in this contention. It can not be said that appellee was a mere cropper. The evidence shows that two years prior to appellant's entry upon the land, appellee went into possession of it under a lease from the owner for a term of six years, and that he was in the open possession of it when the company entered thereon. Such being the case, he was entitled to hold and protect that possession against appellant and all others. Having given the lease, and put appellee into possession under it, the owner of the land could not destroy the lease nor the right of possession under it, by a subsequent conveyance to the railroad company. Appellee had the right of possession against the lessor and his grantee with knowledge of appellee's rights. Having been thus put into possession under a written lease, it will not do to say that appellee's possession was the possession of the lessor.

The evidence makes it sufficiently clear that it was intended and understood by the contracting parties that the relation created by the lease should be and was that of landlord and tenant. It is equally clear that the portion of the crops that was to go to the landlord was to go to him as rent for the use of the land. To say the least, the evidence tends to show this. The letting was not for one season alone, but for six years If other distinguishing elements were lacking,

this would distinguish the case from those holding that a letting on shares for one season is not a lease. These cases, however, have not been approved to their full extent by this court. See *Woodruff* v. *Adams*, 5 Blackf. 317 (35 Am. Dec. 122). Upon the evidence as presented in the record, we think that appellee had the right to protect the growing crops on the land, and that for the destruction of them by appellant he has the right to prosecute an action, and recover whatever damages he is shown to have suffered. The contract was not that the landlord's portion of the crop should be set apart to him in the fields after grown, but that the corn should be delivered to him in the crib on the place, and the wheat in the half bushel.

In a case where the owner of the land rented three fields to a party for the purpose of raising a crop thereon, said party to deliver to him one-half of it in the bushel at the usual time of threshing, it was held by this court that for the purpose of being, and until it should be, threshed and divided, the tenant was entitled to the possession of the wheat raised, and that he might replevy it from the owner of the land. *Cunningham* v. *Baker*, 84 Ind. 597.

In the late case of *Gordon* v. *Stockdale*, 89 Ind. 240, where the facts were somewhat similar, but much less specific and certain, upon the question of a tenancy and the rights of the tenant to the growing crop, than in the case before us, it was said that the tenant was entitled to the possession of the whole crop until harvested and threshed.

In the case of *Williams* v. *Smith*, 7 Ind. 559, the court below charged the jury that if they were satisfied from the evidence that the wheat in question was a portion of a crop raised by a party as the tenant of another, and that by the terms of the letting the tenant was to pay one-third of the crop raised, in kind, payable in the half bushel, the wheat so raised by the tenant would be his property, and not subject to an execution against the landlord, until it was delivered by the tenant to him. This court held that the instruction

was correct, and said: "The execution defendant could have no valid title to the wheat, until it was delivered to him in some mode known to the law. * * * After the wheat was harvested, it remained the property of the tenant until it was threshed, measured, and one-third of it set apart for his landlord. At least until that was done, it was not subject to the execution." To the same effect see *Lathrop* v. *Rogers*, 1 Ind. 554.

In the case of *Lacy* v. *Weaver*, 49 Ind. 373 (19 Am. R. 683), it was held that the landlord could not replevy from the tenant the portion of the wheat which the tenant had agreed to deliver in the bushel at threshing time, as rent. It was said: "After the wheat was harvested, it remained the property of the tenant until it was threshed, measured, and one half of it set apart for the landlord." See, also, *Chissom* v. *Hawkins*, 11 Ind. 316.

The case of *Frout* v. *Hardin*, 56 Ind. 165 (26 Am. R. 18), was an action by the tenant against the landlord for damages to a growing crop by the landlord's trespassing animals. The court said: "From the evidence, which is all before us, it appears that Frout had leased the lands in question to Hardin for the current year, 1874, to raise a crop, and was to receive as rent one-half of the corn in rows standing in the field. Under this state of facts, * * * the corn was not the joint property of both parties. Their possession was not equal. The tenant had the right to the possession of the corn until the division was made. Afterward, each party had the right to the possession of his own half."

The following instruction by the trial court was held correct: "If the jury find, from the evidence, that the defendant let to the plaintiff certain fields on the defendant's farm, to tend in corn, in 1874, and gave the plaintiff possession thereof, and the defendant was to have, as rent, one-half of the corn in the field, such contract constituted a tenancy, and enabled the plaintiff to maintain an action against the defendant for a trespass of the defendant's cattle on the plaintiff's

corn in such fields, if such a trespass was committed." There is a class of cases distinguishable from those above cited.

In the case of *Hart* v. *State, ex rel.*, 29 Ind. 200, the owner of land rented one field of the farm upon which he resided. The tenant was to raise a crop of corn. As rent, the owner was to have one-third of the crop raised. It was to be his in the field, when "laid by," after which the tenant was to have nothing more to do with it. It was held that after the corn was thus laid by, the one-third became the property of the landlord, and could not be sold on an execution against the tenant. This ruling was based upon the fact that no further delivery was contracted for nor contemplated by the parties. All having been done that was required under the contract, the property vested in the landlord.

In the case of *Lindley* v. *Kelley*, 42 Ind. 294, the owner of the land and the raiser of the crop of corn thereon was each to save and take care of his half of the crop so raised, the division, by rows of ten, to be made at "cutting-up" time. It was held that the landlord's portion might be levied on and sold under an execution against him, and that the execution created a lien upon it from the time the execution came to the hands of the sheriff. The case was distinguished from those above cited, by holding that no delivery was contracted for.

In the case of *Switzer* v. *Miller*, 58 Ind. 561, where the landlord reserved to himself a certain portion of the crops to be put into a barn on the land, it was held that a sale by the landlord of his interest in the lease carried to the purchaser an interest in the growing crops from the time when he purchased the interest in the lease. The nature of the interest is not stated. The landlord had a lien on the crop under the statute. 2 R. S. 1876, p. 342, section 17; section 5224, R. S. 1881. The assignment of the lease carried that lien to the assignee. *Kennard* v. *Harvey*, 80 Ind. 37.

The doctrine deducible from all of these cases seems to be, that where the relation of landlord and tenant exists, and the

tenant is to pay for the use of the land by a portion of the crops raised, he has the exclusive possession of such crops, and may protect them and the possession against the landlord and all others claiming under or through him, so long as anything remains for the tenant to do under the contract, in the way of delivering to the landlord the portion due him.

Our attention has been called to the case of *Scott* v. *Ramsey*, 82 Ind. 330, as sustaining the position of appellant. Under the facts in that case, the landlord had the undoubted right to recover. He had a lien upon the portion of the crop that was taken by one of the defendants, abetted by the other. When the wheat was divided he was entitled to the portion agreed upon by him and the raiser of it.

In the opinion, however, as written by the commissioner, after expressing a doubt as to whether the written contract between the parties was a lease, it is said that, admitting it to be such, and that it created the relation of landlord and tenant between the parties to it, yet, giving effect to it according to its substantial meaning, the contracting parties were tenants in common of the grain produced upon the land. In support of this the cases of *Putnam* v. *Wise*, 1 Hill, 234; *Dinehart* v. *Wilson*, 15 Barb. 595; *Harrower* v. *Heath*, 19 Barb. 331; *Bernal* v. *Hovious*, 17 Cal. 542; *Lowe* v. *Miller*, 3 Grat. 205; *Smyth* v. *Tankersley*, 20 Ala. 212, are cited. These statements may be regarded somewhat as *dicta*, and, therefore, not authoritative. As applied to the case before us, they do not state the law correctly. We can not give our full sanction to the cases cited, because we regard them as in conflict with our own cases, as they are with many others.

It has been held that letting lands upon shares, if for a single crop, is no lease of the land; that in such case the owner of the land and the raiser of the crop are tenants in common of the crop, and hence the former alone must bring trespass for breaking the close. *Bradish* v. *Schenck*, 8 Johns. 151.

In a later case in the same court, KENT, C. J., delivering the opinion, it was held that under a state of facts similar to

the facts in the case before us, where the letting was for six years, it created the relation of landlord and tenant; that an interest in the soil passed; that the landlord and tenant were not tenants in common of the growing crops, and that the interest and property in the crops was exclusively in the tenant, until he had separated and delivered to the lessor his proportion. *Stewart* v. *Doughty*, 9 Johns. 108.

This latter case has been really overthrown by later cases in the same court, and the cases have gone so far as to practically hold that although the letting may be by contract, in the form and nature of a lease, yet, if the compensation to the land-owner is to be a portion of the crop raised, the owner of the soil, and the raiser of the crops, as to the crops, will be tenants in common. The result of some of the holdings is to make them tenants in common of both the crops and the land. Such substantially are the holdings in the cases in 15 Barb. 595, 19 Barb. 331, 1 Hill 234, 17 Cal. 542, 3 Grat. 205, and 20 Ala. 212, *supra*, all cited in the case in 82 Ind. 330, *supra*.

In the case of *Taylor* v. *Bradley*, 39 N. Y. 129, the leading New York cases are reviewed; and while that holding is against our view, the argument of the learned judge is the other way. He followed those cases simply because they had settled the rule in New York. The reason for this ruling, as stated in some of the cases, is, that it protects the owner of the land in his rights to his portion of the growing crops. See *Caswell* v. *Districh*, 15 Wend. 379. This reason can not operate in this State, where, by the statute, the landlord is given a lien upon the growing crops.

The sounder view undoubtedly is, that where the terms of the contract are such as to show that the contracting parties understood and intended that the relation of landlord and tenant should be created thereby, the contract will be a lease, although the landlord is to be compensated for the use of the land by a portion of the crops raised; and that where, in such case, the landlord's portion is to be delivered at a fixed

time, the tenant in possession of the land has the exclusive possession of the growing crops until such time and delivery. Such are our own cases, which are supported by the following, and many other cases that might be cited: *Harrison* v. *Ricks*, 71 N. C. 7; *Walls* v. *Preston*, 25 Cal. 59; *Alwood* v. *Ruckman*, 21 Ill. 200; *Dixon* v. *Niccolls*, 39 Ill. 372; *Sargent* v. *Courrier*, 66 Ill. 245; *Symonds* v. *Hall*, 37 Maine, 354; *Hoskins* v. *Rhodes*, 1 Gill. & J. (Md.) 266; *Burns* v. *Cooper*, 31 Pa. St. 426; *Ream* v. *Harnish*, 45 Pa. St. 376; *Overseers* v. *Overseers*, 14 Johns. 365.

When such are the relations and rights of the parties, they are not and can not be tenants in common of the growing crops, as there is not and can not be a unity of possession. 4 Kent Com. 367; Whart. Law Lex. 811; Bouv. Law Dict. Rapalje & L. Law Dict.; *Silloway* v. *Brown*, 12 Allen, 30.

It is insisted further, by the appellant's counsel, that the damages assessed by the jury are excessive. This question is not before us, for the reason that it was not assigned as a cause for a new trial in the court below. As we find no error in the record on account of which the judgment should be reversed, it is affirmed, with costs.

Filed April 2, 1884.

No. 11,263.

MILLS ET AL. *v.* WINTER.

94 329
141 554
94 329
145 292
94 329
150 344

SUPREME COURT.—*Complaint.—Demurrer.*—A complaint prayed for relief, either the rescission of a contract or damages for deceit, and there was judgment for damages only. The overruling of a demurrer to the complaint was assigned for error, but the argument questioned only its sufficiency for rescission. The Supreme Court refused to consider that question.

SAME.—*Bill of Exceptions.—Evidence.—Witnesses.*—Where a bill of exceptions shows that the party offered, but was not permitted, to prove a certain fact by several witnesses named, the fact being proper evidence, but does not show that the witnesses were produced, no error is shown.

PARTIES.—*Husband and Wife.—Statute Construed.*—A suit by a wife for de-

ceit in obtaining a conveyance of her lands concerns her separate property, and section 254, R. S. 1881, authorizes her to sue alone in such case.

EVIDENCE.—*Witness.—Opinion.—Non-Expert.*—When it is material to prove that a person was of fickle mind, a witness, not an expert, who was well acquainted, is competent to give his opinion upon the subject, based upon facts to which he had testified.

SAME.—*Immateriality.—Error.*—The admission of immaterial evidence is not available error.

From the Montgomery Circuit Court.

G. D. Hurley, B. Crane and *R. B. Green,* for appellants.

M. Thompson, W. B. Herod, W. H. Thompson and *J. F. Harney,* for appellee.

BLACK, C.—The appellee, Martha Winter, sued Louisa Stringer and the appellants, Henry D. Stringer and William Mills, and obtained judgment against the appellants. Said Mills alone assigns as errors the overruling of his demurrer to the complaint, the overruling of his motion for a new trial, and the overruling of his motion in arrest of judgment.

The demurrer stated as causes, defect of parties plaintiffs, in that James Winter was a necessary plaintiff; defect of parties defendants, in that he was a necessary defendant, and want of sufficient facts.

The complaint charged that the defendants, by fraudulent representations and practices stated, induced the plaintiff to exchange her certain real estate in Montgomery county, Indiana, for certain land of the defendant Louisa Stringer in Illinois, a certain sum of money also being received by the plaintiff in the transaction. The prayer was in the alternative, for a rescission or for damages.

The objections urged in argument upon the subject of the sufficiency of the facts stated relate only to the question of the sufficiency of the complaint as a complaint for rescission. The judgment was not for rescission, but was for damages.

As counsel have suggested no infirmity which could be regarded as a defect in a complaint for damages only, we will assume the complaint to be sufficient as a complaint for deceit.

The record does not show the date of the filing of the orig-

inal complaint. That to which the demurrer was directed was a substituted complaint filed in February, 1883. It showed that at the time of the fraudulent transaction alleged therein, November, 1880, and immediately thereafter, James Winter was the husband of the plaintiff, but unless it must, therefore, be presumed that she was still a married woman, it was not shown that she was such. However this should be regarded, we think that an action brought by a married woman for deceit in the procurement of a transfer by her of her separate property, is an action concerning her separate property within the meaning of the provision of section 254, R. S. 1881, that a married woman may sue alone when the action concerns her separate property. No suggestion of defect of parties defendants has been made in argument.

Of the causes stated in the motion for a new trial but two are relied on here.

The plaintiff introduced evidence to impeach the character for truth of the defendant Henry D. Stringer, who had testified as a witness for the defendants. After the close of the plaintiff's evidence in rebuttal, the record shows the following: "The defendants offered to introduce the following witnesses in support of the character of defendant H. D. Stringer for truth and veracity." Five names of persons are then set out. "The court overruled the offer, to which ruling of the court the defendants, by counsel, at the time excepted."

It is the uniform practice of this court to refuse to set aside rulings of the trial court unless they appear to be erroneous, and, for the purpose of upholding the result reached below, to indulge every reasonable presumption in favor of those rulings.

No objection to what was offered appears to have been made on behalf of the plaintiff. It is not shown on what ground the court overruled the offer. We can not say that the record is wholly inconsistent with the existence of some valid reason for the ruling.

If an offer were made in the form here shown, and the wit-

nesses named were not present, it would not be error to overrule the offer. In such case the proposition should be for opportunity to bring in the witnesses, and the ruling of the court would involve the consideration, among other things, of the question of diligence, a question which would not enter into a ruling excluding a witness present in court. So, if an offer were made as here shown by the record, and if the witnesses named, being produced, were, for any reason, incompetent to testify, it would not be error to overrule the offer.

For all that appears in the record, such reasons for overruling the offer as we have supposed may have existed.

In such a case, the party excepting should see to it that the bill of exceptions is so made up as to show affirmatively that the offer should have been sustained.

In the complaint it was stated, as a part of the fraudulent means by which the plaintiff was prevailed upon to convey her land, that the defendant Henry D. Stringer, knowing that the plaintiff's husband, James Winter, was of a fickle, visionary turn of mind and was easily influenced by said Stringer, obtained an undue influence over him by various artifices stated, and got his assistance in carrying out the fraudulent purposes of the defendants to cheat and defraud the plaintiff out of her land.

On the trial, one Daniel W. Rouk, a witness testifying on behalf of the plaintiff, was asked by the plaintiff, referring to said James Winter: "What would you say as to his being a man of fickle mind?"

The record shows an objection to this question, on the grounds that it was incompetent, irrelevant and immaterial, and "the witness is not shown to be an expert on questions of this sort, and it is improper to prove the fact in that way."

The objection was overruled, and the witness answered: "I consider him very fickle minded."

The objection that the evidence was incompetent was too general. If it was immaterial, that would be sufficient reason for excluding it, but not a good reason for reversing the

judgment because of its admission. What has been said of the complaint shows that the evidence was not irrelevant.

The mental characteristic, concerning which inquiry was made, was a matter in regard to which the witness had shown himself qualified to testify, though he was not an expert, by reason of his acquaintance and intercourse with James Winter, and their dealings with each other; and he stated in answer to another question, that his answer to the question to which objection was so made was based upon the facts which he had previously stated.

We find no available error in the record; therefore, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed April 2, 1884.

No. 10,855.

HITE v. SIMS ET UX.

94 333
144 491

WILL.—*Resisting Probate.—Calling Jury as to Questions of Fact.—Chancery Practice.—Special Findings.*—Where, in an action resisting the probate of a will, the court, of its own motion and without objection, calls a jury and submits to them material questions of fact without requiring them to find a general verdict, the answers of the jury are not binding upon the court, but are, as in chancery practice, simply advisory, and the court may make its own finding upon the evidence, contrary to such answers.

SAME.—*Fraud.—Unsoundness of Mind.—Delusion.*—Where, in such action, resisting the probate of a will because of alleged unsoundness of the testator's mind, and fraud practiced upon him, when making the will, it is found that the testator, when making the will, was of sound mind, and not overcome by persuasions, importunities, coercion, force or threats, and that he was laboring under no delusion as to the amount of his property, a further finding that he was laboring under a delusion that certain of his children contestors had treated him badly will not justify a refusal to admit the will to probate.

From the Greene Circuit Court.

A. G. Cavins and *E. H. C. Cavins*, for appellant.

E. E. Rose and *L. Shaw*, for appellees.

HAMMOND, J.—The appellant is the widow and one of the devisees of Joseph Hite, deceased. The appellee Mary E. Sims, wife of her co-appellee, is the daughter of the decedent by a former marriage. This was a proceeding by the appellees to resist the probate of said Joseph Hite's will, on the alleged grounds that he was of unsound mind at the time of its execution, and that its execution was procured by fraud. No question is made as to the pleadings or parties. The case, by agreement of parties, was submitted to the court for trial. The court, of its own motion, directed the calling of a jury and submitted to them certain interrogatories, which they answered without returning a general verdict. The questions asked and the jury's answers thereto were as follows:

"1. Was Joseph Hite, at the time he executed the will offered for probate, of sufficient mind and memory to know the extent and value of his property, and what each of his children deserved out of his estate, with reference to their conduct towards him, and also their necessities; and did he have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and executed? Ans. Yes.

"2. At the time Joseph Hite made his will were there any persuasions in regard to making his said will, of such character and degree, brought to bear on him that he could not resist them in making his will? Ans. No.

"3. At the time Joseph Hite made his will were there any importunities in regard to making said will, of such character and degree, brought to bear on him that he could not resist them in making his will? Ans. No.

"4. At the time Joseph Hite made his will was there any force, of such character and degree, brought to bear on him in regard to making his will that he could not resist said force in making said will? Ans. No.

"5. At the time Joseph Hite made his will was there any

coercion, of such character and degree, brought to bear on him in regard to making his will that he could not resist said coercion in making his said will? Ans. No.

"6. At the time Joseph Hite made his will were there any threats, of such character and degree, brought to bear on him in regard to making his will that he could not resist said threats in making his said will? Ans. No.

"7. At the time Joseph Hite made his will was he laboring under a delusion, which had no existence at all except in his own imagination, in regard to the amount and value of the property he had advanced to his children by his first wife? Ans. No.

"8. At the time Joseph Hite made his will was he laboring under a delusion, which had no existence at all except in his own imagination, in regard to the conduct of his children by his first wife toward him? Ans. Yes."

The appellant moved for judgment admitting the will to probate upon the answers of the jury to interrogatories, which was overruled. The court then made a finding and rendered judgment against the validity of the will and refusing its admission to probate. The appellant moved for a new trial for causes, *inter alia*, that the finding was not sustained by sufficient evidence and was contrary to law. This motion was overruled.

The jury, by their answers to interrogatories, found, in legal effect, that the testator at the time of making his will was of sound mind, and that such will was not the result of persuasions, importunities, coercion, force or threats; and that he was laboring under no delusion with regard to the amount and value of the property he had advanced to his children by his first wife. The answer to the eighth question, that when he made the will he was laboring under a delusion respecting the conduct of the children of his first wife, does not in any way militate against his testamentary capacity or the due execution of his will. It is not found whether the delusion mentioned related to the good or bad conduct of the children by

his first wife, or that it was an insane delusion, or in any way affected the provisions of the will. The answers to the interrogatories, taken altogether, are wholly irreconcilable with the finding of the court, and yet we can not say that there was error in refusing to admit the will to probate on such answers. The case was tried by the court under the chancery practice, the court, for its own information, simply taking the opinion of the jury upon certain questions of fact. In such case a party is not, of right, entitled to judgment on the special findings of the jury. The court makes its own finding upon the evidence; the opinion of the jury is simply advisory, and may be adopted or rejected by the court at its discretion. We do not decide that the chancery practice governs in contesting the validity of wills. In the present case, it was adopted without objection in the trial of the case, and for this reason, at all events, there was no error in refusing judgment in favor of the appellant upon the special findings of the jury.

We think, however, that the court erred in overruling the appellant's motion for a new trial. The evidence, as it comes to us in the record, establishes quite conclusively and without conflict, that the testator was of sound mind when he made the will, and that it was duly executed.

Judgment reversed, with instructions to the court below to sustain the appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

Filed April 1, 1884.

No. 11,103.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY v. FLANIGAN.

SUPREME COURT.—*Conflicting Evidence.—Finding.*—Where the evidence is conflicting, the Supreme Court will not disturb the finding of the trial court, nor reverse its judgment, upon such evidence.

From the Montgomery Circuit Court.

J. G. Williams, for appellant.

G. W. Paul, M. D. White and *J. E. Humphries*, for appellee.

HOWK, C. J.—This was a suit by the appellee to recover of the appellant the value of certain of his animals, run over and killed by appellant's locomotives and cars at a point on the line of its road where it was not securely fenced in. Appellee's complaint contained five paragraphs, each of which counted upon a different transaction. The suit was commenced before a justice of the peace of Montgomery county, and, after trial and judgment in appellee's favor, it was taken by appeal to the circuit court of the county. There the trial of the cause by the court resulted in a finding for the appellee, and, over appellant's motion for a new trial, judgment was rendered accordingly.

In this court the only error assigned by the appellant is the overruling of its motion for a new trial. The only causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and was contrary to law, and that the damages were excessive.

In his brief of this cause the learned counsel of the appellant says: "There is no controversy about the stock, described in the complaint, having been killed by the cars of appellant, nor about the liability of the appellant for the value of the bull mentioned in the fifth paragraph of the complaint. The sole controversy in the case is as to the liability of appellant for the stock mentioned in the first four paragraphs of the complaint, all of which were killed prior to the 29th day of April, A. D. 1881."

The only ground upon which it is claimed that the appellant is not liable for the stock mentioned in the first four paragraphs of the complaint is, that on the 29th day of April the appellee entered into a written agreement with the appellant, which, it is assumed, operated as a release of the appellant, upon the facts shown by the evidence, from any and all

damages for, or on account of, his live-stock killed by it prior to that date. We set out a copy of this written agreement as follows:

"I agree and bind myself in the event the Terre Haute and Indianapolis Railroad Company will give me a pass for stock of the following dimensions, namely: A width of seven feet or over and a height as now located, said opening to be at the first water pass west of the dirt road leading north and south by the house of the undersigned Flanigan, and in consideration of this I will release said railroad company from any and all damage for stock killed to this date, and will execute a deed of R. W. to said company for a width of sixty feet over my land, the said railroad company fencing on both sides of said track over the said land. And further, the said railroad company will build one-half of the fence from the cattle pass to the wagon road. The said railroad company to produce an old release of right of way and show the same to me over this land. Also maintain the cattle-guards and farm crossings on the above described wagon road. The dirt in said cattle pass to be taken out by said railroad company, at its expense, and of a depth as may be required by me, and the said railroad company will furnish at their own expense, stone sufficient to give a depth of six inches through the said cattle pass. A. B. FLANIGAN.

"April 29, 1881. HENRY CUSHING,

"Agent T. H. & I. R. R."

It will be observed that this instrument is not a release. It is merely an agreement or obligation on the part of the appellee, that if certain things are done by the appellant, he will release it from any and all damages for stock killed to this date, April 29th, 1881. The instrument is somewhat confused and uncertain in its phraseology and meaning, and, manifestly, was not prepared by an accurate or skilful draughtsman. Fairly construed, however, the instrument required that the appellant should do and perform several things, on its part to be done and performed, before it could successfully claim

either that the instrument itself should operate as, or that the appellee should execute, a release of the appellant from any and all damages for his stock killed prior to the date of such instrument. As we read the instrument, the appellant was thereby required to open and construct a cattle pass under its road for the appellee, to build one-half of the fence from such cattle pass to the wagon road, to produce an old release of the right of way and show it to the appellee, and to maintain the cattle-guards and farm crossings on such wagon road. All these things were to be done and performed by the appellant, as it seems to us, before it could claim that the appellee was even bound, by the foregoing instrument, to release it from any and all damages for his stock killed prior to the date of such instrument.

It is not claimed by the appellant that it had ever done or performed any one even of the several things above mentioned; but an effort was made to show by the evidence that it had attempted to open and construct the cattle pass, in accordance with the written agreement, and was prevented from so doing by the appellee. Upon this point, however, the evidence was conflicting. The appellee's evidence was that the appellant had never offered even to open and construct, and never had opened and constructed, the cattle pass mentioned in the agreement. Appellee testified: "I went down to where Michael Ryan was at work at the pass, and asked him what he was going to do. He said he was going to clean the pass out. I told him that if that was all he was going to do, it would do no good. I told him I did want a cattle pass. I do want one, and would now release the claim if they would build it. The company did not build any cattle pass. * * * They never showed me any release."

If the trial court believed, as it had the right to do, the appellee's evidence, in preference to the evidence in conflict therewith, appearing in the record, the court could not, as it did not, find that the written agreement above set out was a release, on the part of the appellee, of the appellant from any

and all damages for his stock killed prior to the date of such agreement. Upon the one controverted point in this case, as to which the appellant had the burden of the issue, the court found for the appellee on contradictory evidence. We are of opinion that the finding was right on the evidence; but, if it were otherwise, under the settled practice of this court, the finding could not be disturbed, nor the judgment reversed, upon the weight of the evidence. *Cornelius* v. *Coughlin*, 86 Ind. 461, and cases cited.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed March 27, 1884.

94 340
181 59

No. 9565.

HAYWOOD ET AL. *v.* HEDRICK.

NEGLIGENCE.—*Master and Servant.—Complaint.*—In a suit by one not a servant against a master to recover damages resulting from his servant's negligence, the complaint may impute the servant's negligence directly to the master.

PLEADING.—*Practice.*—Where the general denial is pleaded, other paragraphs averring facts provable under the general denial are useless, and there is no available error in holding them bad on demurrer. For examples, see opinion.

SAME.—*Practice.—Defects Cured.*—Where the fault of a complaint is merely that the facts are defectively stated, the fault is cured by verdict, and is not available in arrest of judgment or in error.

From the Superior Court of Tippecanoe County.

G. W. Paul, J. E. Humphries, G. O. Behm and *A. O. Behm*, for appellants.

W. C. Wilson and *J. H. Adams*, for appellee.

NIBLACK, C. J.—Suit by Hiram H. Hedrick against Curtis S. Haywood and Robert Craig, for causing the destruction of certain property by fire.

The plaintiff was, on the 19th day of August, 1880, the owner of considerable quantities of unthreshed wheat and

oats in stacks, and of some fencing and pine lumber, all situate near together, on his farm in Tippecanoe county. The defendants were, at the same time, the owners of a threshing machine propelled by a portable steam engine, and, having been previously employed so to do, undertook and commenced to thresh the plaintiff's wheat and oats. The complaint charged that "while the said defendants were engaged in said undertaking, they so unskilfully, negligently and carelessly conducted themselves in and about the premises, by then and there employing an incompetent, unskilful and negligent person, and who was then and there in charge of defendants' said engine, and furnishing said engine with an insufficient and defective spark arrester, and by taking off or throwing up said spark arrester, whereby sparks and coals of fire were permitted to escape from the smoke stack of said engine, and which were communicated to said stacks of grain and pine lumber and rails, wholly consuming the same, all without the fault or negligence of the plaintiff."

The defendants answered: *First.* In general denial. *Second.* That a sufficient draft in the furnace attached to the engine could not be obtained without raising the spark arrester and keeping it raised when it was threshing, of which fact the plaintiff had full notice when he employed the defendants to thresh his wheat and oats; that with knowledge of that defect in the engine, the plaintiff, in the absence of the defendants, caused their engineer to set the engine and to commence threshing in time of a high wind, whereby sparks were carried a distance of forty feet, where they came in contact with and ignited the stacks of wheat and oats. *Third.* That a person, who was neither the servant nor the agent of the defendants, nor in any manner in their employment, and acting without any authority from and the knowledge of the defendants, wrongfully raised the spark arrester attached to the engine and permitted sparks to escape, whereby the plaintiff's property was burned and destroyed. Demurrers were sustained to the second and third paragraphs of the answer.

The court, at the mutual request of the parties, made a special finding of the facts, finding, amongst other things, that the engineer in charge was an incompetent engineer, and that the sparks which ignited and destroyed the plaintiff's property were negligently permitted to escape, without fault or negligence on the part of the plaintiff, and assessing the plaintiff's damages at $374.25. A motion for a new trial having been first overruled, the defendants moved in arrest of judgment, and that motion being also denied there was judgment against the defendants.

It is first claimed that the demurrers to the second and third paragraphs of the answer ought to have been overruled. It is true, as contended, that the facts contained in both of these paragraphs were such as tended to defeat the plaintiff's demand for damages.

The second paragraph amounted to a charge that the plaintiff had been guilty of contributory negligence, and the third to an allegation that it was not the defendants, but some third person, who caused the plaintiff's property to be destroyed.

These were all matters admissible in evidence under the general denial, and hence did not have to be specially pleaded to make them available as a defence. Addison Torts, par. 585. The defendants were consequently not injured by the ruling of the court upon these paragraphs of answer.

The next objection made to the proceedings below is, that the finding of the court was not sustained by the evidence, but that argument must have been inadvertently submitted as the evidence is not in the record.

It is made a further ground of objection here that the complaint was materially defective, and that for that reason the motion in arrest of judgment ought to have been sustained.

The argument in support of this objection is, that the complaint was bad for failing to charge that the defendants had been guilty of negligence in the selection and employment of the engineer, who was in charge of their engine when the injury complained of was inflicted; that where, in cases like

this, the principals do their whole duty in placing their business in the hands of suitable persons, they are not responsible for the negligence or mismanagement of their agents or employees.

The authorities cited as sustaining this position have reference to cases in which the servant sues the master for the negligence of his fellow servant, and not to actions by a plaintiff who had no such business relations with the master at the time of the alleged injury. In actions of the class to which this belongs, the negligence of the servant is imputed to the master, and it is sufficient to charge the injury sued for directly to the master. *Ohio, etc., R. W. Co.* v. *Collarn*, 73 Ind. 261 (38 Am. R. 134); Addison Torts, secs. 579 and 586.

In charging the negligence of the defendants as the proximate cause of the destruction of the plaintiff's property, more direct, compact and incisive allegations might have been made. It would have been more in accordance with the rules of strictly good pleading to have charged that the sparks were *negligently* permitted to escape from the engine, but whatever the defects or imperfections of the complaint may have been, they were of a character which were curable by a verdict in favor of the plaintiff, and were, consequently, cured by the finding of the court.

Error is assigned upon the alleged insufficiency of the complaint, but that adds nothing to the force of the objections made to that pleading upon the motion in arrest of judgment.

When, as in this case, there has been no demurrer to the complaint, and its defective averments have been cured by the verdict, such defective averments can not, either by motion in arrest of judgment, or by assignment of error in this court, be made available as a cause for a reversal of the judgment. *Toledo, etc., R. W. Co.* v. *Stevens*, 63 Ind. 337.

The judgment is affirmed, with costs.

Filed Nov. 20, 1883. Petition for a rehearing overruled April 3, 1884.

No. 10,946.

94 344
152 428

MEIKEL v. GREENE.

DEED.—*Description.*—The description of land in a deed by metes and bounds, giving a definite corner of a certain city lot as the commencement, and thence courses and distances which will close, is good.

EJECTMENT.—*Evidence.*—In ejectment for part of a city lot, the recorded plat of the lot is proper evidence for the plaintiff.

TRUST AND TRUSTEE.—*Non-Resident.—Statute Construed.*—The statute, R. S. 1881, section 2988, has no application to a trust in lands arising by operation of law.

PRACTICE.—*Argument to Jury.—Directing Verdict.*—Where the evidence is without conflict, and there is no question of fact arising upon it, the court may refuse to permit argument to the jury, and may direct a verdict.

From the Marion Circuit Court.

J. Buchanan, G. B. Manlove, S. M. Shepard and *C. Martindale,* for appellant.

S. J. Peelle, W. L. Taylor, B. Harrison, C. C. Hines and *W. H. H. Miller,* for appellee.

ELLIOTT, J.—Appellee claims title to the real estate in controversy through a sale made upon a decree of foreclosure, rendered upon a mortgage executed by appellant's grantor.

One of the points relied on for a reversal is that the description of the property is so defective and uncertain as to be void. The description reads thus: "Part of lot number nine (9), in square number fifty-five (55), in the city of Indianapolis, bounded and described as follows: Beginning thirty-nine (39) feet from the most southeast corner of said lot number nine (9), thence east on the north line of Washington street seventeen (17) feet; thence north one hundred and twenty (120) feet to an alley; thence west along the south line of said alley seventeen (17) feet; thence south one hundred and twenty (120) feet to the place of beginning."

We think that this description furnishes means of identifying the particular parcel intended to be conveyed, and is,

therefore, sufficient. We do not understand that it is the office of the description to identify the particular parcel, but to supply the means of identification. Where means of identification are furnished, persons interested in the property may always make the description certain by referring to the sources of knowledge supplied by the deed. In the present instance the corner of lot nine can be ascertained from the public record, and this once ascertained there can be no difficulty in running the boundary lines. The sheriff can readily execute the writ, and this proves the description to be sufficient.

It was proper for the appellee to introduce in evidence the recorded plat of square fifty-five. In actions to recover real property, it is competent to give evidence which will enable the court to identify the particular parcel involved in the legal contest.

The property in controversy was bid in by Joseph A. Moore, and on the 10th day of November, 1879, the sheriff's certificate was assigned to appellee, Jacob L. Greene, a resident of Connecticut, who received a deed from the sheriff. The title of appellee, although the deed on its face conveyed to him in his own absolute right, was that of trustee for a foreign corporation. The trust was not, however, created by any deed or instrument of writing, but arose by operation of law, from the fact that the purchase-money was paid by the corporation for whose benefit the appellee orally agreed to hold. The act of 1879 does not apply to such a case; it applies only to cases where there is an express trust created by deed, mortgage or other written instrument. *Rinker* v. *Bissell*, 90 Ind. 375.

There was no conflict in the evidence, and no questions of fact to be argued to the jury, and the court did not err in refusing to allow appellant's counsel to make an argument to the jury. The whole case turned upon questions of law, and these were fully argued to the court, and it was, therefore, right to deny further discussion, for juries in civil cases are not judges of the law.

The court did right in instructing the jury to find for the appellee. There was no conflict in the evidence, and the trial court did no more than its duty in directing a verdict.

Judgment affirmed.

Filed Dec. 21, 1883. Petition for a rehearing overruled April 4, 1884.

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94 346
139 350

No. 10,278.

KNOX v. TRAFALET.

PRACTICE.—*Special Finding.*—Upon a special finding of facts by the court, a party may move, as in case of a special verdict, to make more specific, to strike out a part, or for a finding of facts omitted.

SAME.—*Bill of Exceptions.*—A proper bill of exceptions, filed in vacation according to leave granted at the time of trial, will put in the record rulings made during the trial.

SAME.—*Motion to Make Special Findings Specific.*—A fact found not within the issues is surplusage, and a motion to make it more specific should be refused; and a finding that the defendant had the right, as stated in the third paragraph of his answer, is as certain as if the averments of the answer were repeated.

SAME.—*Conclusions of Law.—Error.*—Error in conclusions of law in favor of the objecting party is not available.

SAME.—*Venire De Novo.*—Where a special finding states facts sufficient to justify the judgment, a *venire de novo* is properly refused.

COSTS.—The costs of such issues as are found against the prevailing party should be taxed against him.

From the Switzerland Circuit Court.

S. Carter, W. R. Johnston, F. M. Griffith, J. D. Works and *J. A. Works*, for appellant.

W. D. Ward and *T. Livings*, for appellee.

FRANKLIN, C.—Appellant brought this action in trespass against appellee for passing over his grounds. Appellee answered in three paragraphs, the first a denial, the other two special, pleading a license and right of way, the second being in the nature of a cross-bill. A demurrer was overruled to the third paragraph. A reply was filed in three paragraphs.

The first was a denial. Part of the third was struck out on motion of the defendant, and then a demurrer was sustained to the second and third paragraphs of the reply.

There was a trial by the court, a special finding made, and conclusions of law stated by the court. Motions were made to make the special findings more specific, to strike out a part of the special findings, for a *venire de novo*, and for a new trial, all of which were overruled. Exceptions were also taken to the conclusions of law, and judgment rendered for the plaintiff for $1.00.

The errors assigned are:

1st. Overruling the demurrer to the third paragraph of the answer.

2d. Sustaining the demurrer to the second paragraph of the reply.

3d. Sustaining the demurrer to the third paragraph of the reply.

4th. Sustaining motion to strike out part of third paragraph of reply.

5th. Overruling motion to make special finding more specific.

6th. Overruling motion to strike out fifth and sixth special findings.

7th. Error in conclusions of law.

8th. Overruling motion for a *vénire de novo.*

9th. Overruling motion for a new trial.

10th. Overruling part of the motion to tax costs.

Upon examination of the record we find no error in the rulings upon the pleadings.

Among the thirty-two reasons stated for a new trial appellant's counsel insist, in their elaborate brief of eighty-seven pages, that the court ought to have granted a new trial for the errors in overruling appellant's motion for the court to make its findings more specific, and for refusing to strike out a part of its special findings; that the court also

erred in overruling his motion for a *venire de novo*, and in its conclusions of law.

The validity of the special findings, and the correctness of the conclusions of law, are thus variously brought in review. Upon the trial the court was requested to find the facts specially, and state its conclusions of law thereon.

The 551st section, R. S. 1881, provides: "Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case, the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly." The R. S. 1876, under which this case was tried, is the same.

Under this statute, when a case is tried by the court, a special finding is similar to a special verdict when the case is tried by a jury. Upon the return of a special verdict by a jury, either party has a right to object to the same, and move the court to have the jury to make it more specific, or to move to strike out any part of it, or to require the jury to state further the facts of any issue omitted, and we see no reason why the same rights should not extend to a special finding made by the court. The difference that the court is required to state its conclusions of law upon the facts, while a jury has nothing of that kind to do, makes no difference between the contents of a special finding by the court and a special verdict by the jury. *Anderson* v. *Donnell*, 66 Ind. 150.

But it is insisted by appellee, in his equally voluminous brief with appellant's, that there was no special bill of exceptions filed at the time of the various rulings complained of, nor during the term at which the trial was had, and that the filing of the several bills of exceptions afterwards in vacation, although within the time allowed by the court, did not bring forward within the record the various rulings made during the trial, but only brought forward the evidence. This rule

has been made to apply where no leave to file bills of exceptions was granted during the term of the trial, but granted at the next term upon the overruling of a motion for a new trial. In this case the leave was granted at the term of the trial, and the bills of exceptions were filed within the time granted by the court. This is sufficient.

The special findings and conclusions of law read as follows:

"1st. That the parties were and are the owners of the tracts of land mentioned in the complaint and in the third paragraph of the answer, as therein stated, the defendant having derived his title to his land as alleged in the said third paragraph of his answer.

"2d. That the defendant, within and during the period mentioned in the complaint, viz., on the 30th day of April, 1880, and on divers other days and times between that day and the time of the commencement of this action, went upon and over the said lands of the plaintiff, but there is no evidence that he tore down the fences or broke open and forced the plaintiff's gates there situated.

"3d. That at the several times when he went upon the lands of the plaintiff, with one exception, he went upon and along a certain private way there situated, upon which he claimed the right to go, derived from the plaintiff, as alleged in the third paragraph of answer.

"4th. That the said defendant had the right to the said way, and to use the same as alleged by him in the third paragraph of his answer.

"5th. That at the said times, when the said defendant so went upon the lands of the plaintiff upon and along the said private way, he was not guilty of committing any trespass.

"6th. That when the said defendant went on the lands of the said plaintiff at the said other time, when he did not go upon and along the said private way, he was guilty of trespassing upon the said lands of the plaintiff, to the damage of the plaintiff one dollar.

"CONCLUSIONS OF LAW.

"1st. That at the said times when the defendant went upon lands of the plaintiff, while in said private way, he is not guilty.

"2d. That as to the said other time when the defendant went upon said plaintiff's lands outside of said private way, he was and is guilty of trespass, and that the plaintiff ought to recover against him the said sum of one dollar in damages.

"3d. That the plaintiff ought to recover of the defendant his costs and charges, except as to the issue upon the third paragraph of the defendant's answer, and that as to the costs of the issue upon the said third paragraph of answer, the defendant should recover the same of the plaintiff."

Are these special findings sufficient? And are the conclusions of law correct? The first fact found is that the parties are the owners of their respective lands claimed as set forth in their pleadings. There was no controversy about the ownership of their lands, and it would do appellant no good or harm for the facts constituting ownership to be stated with more particularity.

The second fact found is that the defendant passed over the plaintiff's land at divers times, giving the dates. This fact is stated with sufficient certainty.

The third fact stated is that each time when he so passed over plaintiff's land, but one, he passed where he claimed to have the right of way, as alleged in the third paragraph of his answer. This is specific and certain enough to locate and determine where he passed over the plaintiff's land, with the one time excepted.

The fourth fact is that the defendant had the right to the said way and to use the same, as alleged by him in the third paragraph of his answer. This statement may be a little too general. The third paragraph of the answer set forth specifically the location of the right of way, and how the defendant acquired it. This statement is equivalent to finding that the facts stated in the third paragraph of the answer are

true instead of setting out the facts constituting his right to and the use of the way. The appellant being informed of these facts constituting such right of way by their being stated in the answer, and sufficient facts were fully stated there for that purpose, appellant was not harmed by their not being again stated in the findings. If this general statement of the court be error, we think, under the circumstances of this case, it is a harmless error.

The fifth is that when said defendant so went upon plaintiff's lands upon and along said private way, he was not guilty of committing any trespass. And the sixth is that when he went on said plaintiff's lands, but not upon and over said private way, he was guilty of trespass to the damage of the plaintiff $1.

These two statements are mere conclusions, based upon the third and fourth findings, and more properly belong to the conclusions of law than the statement of facts, except as to the fact stated in the conclusion of the sixth finding, that the plaintiff was damaged $1. But these conclusions, being in the findings, do not invalidate the facts properly stated, and can not harm appellant, they being mere surplusage.

We think there is no available error in overruling the motion to make the special findings more specific, nor in overruling the motion to strike out the fifth and sixth special findings.

The conclusions of law, as to appellant, we think, are correct. If there is any error in them, it is against the appellee. Without any finding that appellee's passing over appellant's lands, not upon the private way, was wrongful, there was no finding upon which to base the conclusion of law that in so doing he was a trespasser; such passage may have been by the consent of appellant, and no trespass whatever. But of this appellant can take no advantage. There is no available error in the conclusions of law.

As to the motion for a *venire de novo*, there is no uncertainty, ambiguity or contradiction in the special findings,

and we think they contain facts sufficient to sustain the judgment as to appellant. Facts not found are considered as not having been proved, as against the party upon whom rests the burden of proof. *Graham* v. *State, ex rel.*, 66 Ind. 386; *Ex Parte Walls*, 73 Ind. 95; *Nitche* v. *Earle*, 88 Ind. 375; *Hunt* v. *Blanton*, 89 Ind. 38; *First Nat'l Bank* v. *Carter*, 89 Ind. 317. There is no error in overruling the motion for a *venire de novo.*

As to the overruling of the motion for a new trial, of the thirty-two reasons stated for a new trial, twenty-four are in relation to the admission and rejection of evidence. Upon an examination of the record, we find no substantial error in the rulings on the evidence.

The 1891st section, R. S. 1881, reads as follows:

"In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant."

We do not think that the substantial rights of the appellant were prejudiced by any of these rulings; and there was no available error in overruling the motion for a new trial.

As to the last specification of error, in regard to overruling in part appellant's motion to tax costs, the court taxed the costs upon the issue on the defendant's third paragraph of answer against appellant, and the balance of the costs against appellee. We see no error in this ruling. The evidence sustains the findings.

It appears to us that the merits of the cause have been fairly tried and determined in the court below, and that the judgment should not be reversed in whole or in part. R. S. 1881, section 658.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, with costs.

Filed April 4, 1884.

No. 10,802.

BUTLER UNIVERSITY v. CONARD ET AL.

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126 507
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128 256
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135 87
135 329
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138 551
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141 314
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148 574
148 576
148 577
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NEW TRIAL, OF RIGHT.—*Action for Possession or to Quiet Title.—Mortgage.—Tax Lien.*—A new trial, as of right, should be granted under section 1064, R. S. 1881, in actions for the possession of or to quiet title to real estate, but not in actions to foreclose a mortgage or a tax lien.

SAME.—*Misjoinder of Actions.*—An action to recover possession of land can not properly be joined with an action to foreclose a mortgage thereon, and if such actions be improperly joined, a new trial as of right ought not to be granted, even where the misjoinder has not been objected to, and, if granted, the order granting it should be vacated and such new trial refused.

From the Monroe Circuit Court.

J. H. Louden and *R. W. Miers*, for appellant.

J. R. East and *W. H. East*, for appellees.

HAMMOND, J.—Action by the appellant against the appellees in a complaint of two paragraphs. The first paragraph of the complaint was based upon a mortgage executed by the appellees Chambers and Chambers, and the appellee Conard was made a party defendant as the holder of an alleged invalid tax lien. The appellant averred in the second paragraph of its complaint that it was the owner and entitled to the possession of the real estate in controversy; that the appellees had possession thereof without right, and had committed waste thereon, and prayed for possession and damages. There was no appearance for Chambers and Chambers. Conard answered in three paragraphs. The first paragraph of his answer was a general denial; to the second a demurrer was sustained; and in the third he asserted a tax lien, which, as he claimed, had priority over the appellant's mortgage. He also filed a cross complaint against his co-appellees and the appellant, alleging that he was the owner of the land in question, and asking to have his title thereto quieted. The appellant demurred to the third paragraph of the answer and to

the cross complaint, which, being overruled, it replied to the former and answered the latter by general denial. A trial by the court resulted in the foreclosure of the appellant's mortgage and Conard's tax lien, giving the latter priority over the former. The appellant moved for a new trial as a matter of right, which was granted, but at the following term of court, the order granting it was, on Conard's motion, set aside. The appellant excepted to the overruling of its demurrers to the third paragraph of the answer and to the cross complaint, and to the ruling of the court in vacating the order granting a new trial as of right. These rulings are assigned for error.

The demurrer to the third paragraph of the answer is not in the record; no question, therefore, as to the ruling upon it is presented. *Porter* v. *Silvers*, 35 Ind. 295. The appellant concedes in its brief that the cross complaint was sufficient. This leaves for determination the single question as to the correctness of the ruling in setting aside the order granting the new trial.

Where a motion for a new trial as of right is improperly sustained, the order allowing it may be vacated. *Jenkins* v. *Corwin*, 55 Ind. 21. There might be circumstances, of course, which would estop a party from objecting to the new trial after it was granted—*Marsh* v. *Prosser*, 64 Ind. 293—but no such circumstances existed in the present case. This brings us to the question whether this was a case in which a new trial was allowable without cause.

Section 1064, R. S. 1881, authorizing new trials as a matter of right, has, by repeated decisions of this court, been limited in its application to actions for the possession of, or to quiet title to, real estate. The fact of the title to real estate being in controversy is not sufficient to authorize a new trial as a matter of right, unless it comes in dispute in one or the other of the actions above named. Thus it has been held that section 1064, *supra*, does not apply to actions to enforce liens, or to set aside fraudulent conveyances, in the interest of creditors. *Truitt* v. *Truitt*, 37 Ind. 514; *Shular* v. *Shular*, 56

Ind. 30. Nor to actions for the specific performance of contracts. *Benner* v. *Benner*, 10 Ind. 256; *Allen* v. *Davison*, 16 Ind. 416; *Walker* v. *Cox*, 25 Ind. 271. Nor to an action to recover damages for obstructing an easement. *Larrimore* v. *Williams*, 30 Ind. 18. Nor to an action for partition where there is no claim for possession or to quiet title. *Harness* v. *Harness*, 49 Ind. 384; *McFerran* v. *McFerran*, 69 Ind. 29. Nor to an action by a landlord against his tenant for holding over after the expiration of his lease. *Over* v. *Moss*, 41 Ind. 463. Nor to an action to foreclose a mortgage. *Jenkins* v. *Corwin*, *supra*.

The general policy of the law is averse to litigation. Except as to actions for possession, and to quiet title to real estate, one trial is deemed sufficient, unless some good cause is shown why the losing party was denied a right, for the correction of which a new trial is necessary. Except when it is allowable as a matter of right, the court is not bound to grant a new trial simply because both parties desire it. *Aiken* v. *Bruen*, 21 Ind. 137; *Wright* v. *Miller*, 63 Ind. 220. The cases cited show a disinclination to extend the terms of the statute, allowing new trials as of right, to cases other than those clearly falling within its provisions. In the present case, the appellant joined in its complaint two causes of action. In one of these a new trial is allowable as of right; in the other it is not. An action can not be divided so as to give a new trial as to part, and deny it as to another part of it. *Morris* v. *State*, 1 Blackf. 37; *Richter* v. *Koster*, 45 Ind. 440. What, then, should be the rule in the present case, where two causes of action are joined, in one of which a new trial is, and in the other it is not, allowable as a matter of right?

Under the fifth clause of section 278, R. S. 1881, claims to recover possession of real property, to make partition of, and to determine and quiet the title to, real estate, may be joined in the same action. While, as we have seen, a new trial as of right is not permissible in an action for partition alone, there is much reason for holding, as was decided in *Cooter* v.

Baston, 89 Ind. 185, that it is allowable where this cause of action is joined with a claim for possession or to quiet title. If it were denied the plaintiff where judgment went against him in such case, it would be detrimental to the exercise of a plain right under the statute to join in one complaint these several causes of action. And if this right, in such case, were withheld from the defendant where judgment went against him, the plaintiff could, by availing himself of the provisions of section 278, *supra*, deprive the defendant of the benefit of the provisions of section 1064, *supra*.

But the reasons above suggested, applying to causes of action which may be properly joined, do not have the same, or, in fact, any force as to claims which the plaintiff improperly unites in the same complaint. The defendant has it in his power by demurrer to prevent the misjoined causes of action from being tried together. If the plaintiff, by his fault, incorrectly joins two or more claims in one action, and the defendant permits the misjoined causes to go to trial together, the unsuccessful party in the trial should not be heard to complain because a new trial, as of right, is refused. Either party had it in his power to have the cause of action, in which such new trial is proper, tried by itself, and thus to secure, in case of an adverse judgment, the benefit of a new trial without cause. We think, then, that the true rule is, that where a cause of action to quiet title to, or to recover possession of, real estate is improperly joined with a cause of action in which a new trial as of right is not allowable, the law as to new trials relating to the latter cause of action should govern, and that a new trial in such case, as a matter of right, ought not to be granted. A different rule would place it in the power of parties in all cases to extend the statute, allowing new trials without cause to actions in which it was not intended to apply.

A claim to foreclose a mortgage can not properly be joined with a claim to recover possession of real estate. Where there is such misjoinder of causes of action, one of them be-

ing a cause in which a new trial can be had only for sufficient reason, the law applicable to it, as to new trials, governs the case, and a new trial as of right is correctly refused.

Our conclusion is, that the appellant's motion for a new trial without cause was improperly sustained, and that there was no error in vacating the order granting it.

Affirmed, with costs.

Filed April 3, 1884.

No. 11,188.

YOUNG v. WARDER ET AL.

FALSE IMPRISONMENT.—*Answer.*—An answer, in an action for false imprisonment, justifying under a warrant, must show that the arrest was the same trespass as charged in the complaint.

From the Clark Circuit Court.

M. C. Hester, for appellant.

A. Dowling, for appellees.

BICKNELL, C. C.—This was an action by the appellant against the appellees for false imprisonment. The defendants answered separately. The plaintiff's demurrers to each of the second paragraphs of said answers were overruled. Upon these rulings errors are assigned. The demurrer to the second paragraph of Warder's answer was as follows:

"The plaintiff demurs to the second paragraph of the separate answer of Luther F. Warder to the first and second paragraphs of complaint, for the reason that the same does not state facts sufficient to constitute a good answer to plaintiff's said paragraphs of complaint."

In the case of *Thomas* v. *Goodwine*, 88 Ind. 458, the sufficiency of demurrers in the foregoing form was considered, and this court said: "We feel constrained, therefore, by the previous decisions of this court, to sustain the point made by appellee's counsel against the appellant's demurrers, in the case at bar, and to hold that they do not present the question of

the sufficiency of the facts stated in either paragraph of answer to constitute a cause of defence." See *Lane* v. *State*, 7 Ind. 426; *Riley* v. *Murray*, 8 Ind. 354; *Tenbrook* v. *Brown*, 17 Ind. 410; *Cincinnati, etc., R. R. Co.* v. *Washburn*, 25 Ind. 259; *Kemp* v. *Mitchell*, 29 Ind. 163; *Porter* v. *Wilson*, 35 Ind. 348; *Gordon* v. *Swift*, 39 Ind. 212; *Martin* v. *Martin*, 74 Ind. 207; *Pine Civil Township* v. *Huber, etc., Co.*, 83 Ind. 121.

There was therefore no error in overruling the demurrer to the second paragraph of Warder's answer. The demurrer to the second paragraph of Northcut's answer was as follows:

"The plaintiff demurs to the second paragraph of the answer of the said William H. Northcut to the first and second paragraphs of the plaintiff's complaint, on the ground that the said paragraph of answer does not state facts sufficient to constitute a good defence to plaintiff's said cause of action herein." This demurrer must be held sufficient in form. *Bennett* v. *Shern*, 11 Ind. 324.

The paragraph of Northcut's answer, thus demurred to, was insufficient, because it fails to show that the arrest under the warrant was the same trespass charged in the complaint. *Scircle* v. *Neeves*, 47 Ind. 289. The court therefore erred in overruling the demurrer to the second paragraph of said Northcut's answer. The judgment should be reversed as to the appellee Northcut and affirmed as to the appellee Warder.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below, as to the defendant Luther F. Warder, be and the same is hereby affirmed, at the costs of the appellant, and that the judgment, as to the said defendant William H. Northcut, be and the same is hereby reversed, at the costs of said Northcut, and this cause is remanded, with instructions to the court below to sustain the demurrer to the second paragraph of said Northcut's answer to the first and second paragraphs of the complaint.

Filed March 27, 1884.

No. 11,054.

BUTLER, GUARDIAN, *v.* MOORE, EXECUTOR, ET AL.

94 359
138 510

WILL.—*Construction.*—A. died, leaving surviving two grandchildren, D. and K., the children of a deceased son, C. M., together with eight living children or grandchildren representing such as were dead. By his will, after a specific bequest, was this clause: "The remainder of my estate I give to the following persons, to wit, my daughter A., the children and heirs of my daughter E., my daughter L., my son L., *my grandson D., son of C. M., deceased,* my son J., my daughters M. and R. H., and my son A., the same to be divided into nine equal shares, and one-ninth to each living child, and one-ninth to *the children of each of my deceased children.*"

Held, that the grandchildren D. and K. took one-ninth together.

From the Decatur Circuit Court.

W. A. Moore, J. K. Ewing and *C. Ewing,* for appellant.

J. D. Miller and *F. E. Gavin,* for appellees.

FRANKLIN, C.—This is an appeal from the judgment of the Decatur Circuit Court sustaining a demurrer to a complaint filed by the appellant against the appellees.

The substantial allegations of the complaint are as follows: The appellant is the guardian of Kitty D. Moore, a grandchild of Climpson B. Moore, deceased, and one of the only two children of Cyrus M. Moore, deceased; that Cyrus M. died before his father, the said Climpson B., and left as his only children and heirs the defendant Douglass C. and the plaintiff's ward, Kitty D. Moore; that on the 19th day of September, 1882, said Climpson B. died testate; that his will was duly probated, and that he left an estate of $5,000; that the executor and Douglass C. claim that the said Kitty D. is excluded by the terms of the will from any part of the estate of said Climpson B.

The material parts of the will important to this case are as follows:

"Item 2d. I give and bequeath to my daughter, Rachel Hawkins, the sum of four hundred dollars as a specific legacy, in consideration of services rendered by her for me.

"Item 3d. The remainder of my estate, both real and personal, I give, bequeath and devise to the following persons, to wit: My daughter Ann D. O'Byrne, the children and heirs of my daughter Elizabeth Black, my daughter Leahasenth Kennedy, my son Levi W. Moore, my grandson Douglass C. Moore (son of Cyrus M. Moore, deceased), my son Joseph L. Moore, my daughter Mary M. Powner, my daughter Rachel Hawkins, and my son Andrew Moore, the same to be divided into nine equal shares, one-ninth to each living child, and one-ninth to the children of each of my children who is deceased."

The will is made a part of the complaint.

The appellant prays a construction of the will, and that the court direct the executor to pay the guardian one-half of one-ninth of the estate of said Climpson B., for the benefit of his said ward. A demurrer was sustained to the complaint, and judgment rendered for appellees for costs. The sustaining of said demurrer has been assigned as error.

The appellant insists that under the provisions of the will, his ward Kitty D. Moore is entitled, equally with Douglass C., to a share of the estate. And it is insisted by appellees that the naming of Douglass C. and omitting to name Kitty D. excludes her from any share in the estate, and that the subsequent provision, that one-ninth shall go to the children of Cyrus M., must be limited to the one named, Douglass C., and can not include Kitty D.

Courts have adopted some general rules in relation to the construction of wills, to which we first call attention:

1. The intention of the testator is, where it can be ascertained, the governing criterion in the construction of wills. *Hinds* v. *Hinds*, 85 Ind. 312.

2. Where there are provisions in a will which are conflicting and inconsistent, that which is posterior in local position must be taken to denote the last intention of the testator. *Evans* v. *Hudson*, 6 Ind. 293; *Holdefer* v. *Teifel*, 51 Ind. 343; 2 Jarm. Wills, (5 Am. ed.) 472.

3. Equality is favored in the disposition of estates. Heirs at law are not to be disinherited by conjecture, but only by express words or necessary implication. *Howard* v. *American, etc., Society*, 49 Me. 288; *Wright* v. *Hicks*, 12 Ga. 155; *Hitchcock* v. *Hitchcock*, 35 Pa. St. 393; *Scott* v. *Guernsey*, 48 N. Y. 106.

4. When a will is open to two constructions, and one will give effect to the whole instrument, while the other will destroy a part, the former must be adopted. *Pruden* v. *Pruden*, 14 Ohio St. 251.

5. Omitted words will be supplied where it is evident the testator has not expressed himself as he intended. 1 Redfield Wills, p. 453, *et seq.*

Applying these rules of construction to the will under consideration, and taking the whole will together, the intention of the testator appears to have been to make special provision by his will for his daughter Rachel Hawkins, as expressed in the second item of the will, by giving her a special legacy over and above the other heirs for the reason and consideration of services which she had rendered for him. Otherwise there is no reason expressed or implied for the making of a will. No fact is stated to show any intention that all of the testator's heirs should not take all the balance of his estate, both real and personal, as the law would have directed the whole estate to go.

In the third item of the will, he undertook to give the names of his heirs to whom he gave the balance of his estate, and in the statement of their names he omitted the name of appellant's ward Kitty D. But in the conclusion of the same item, in fixing the share of each, said ward was included in the language, "one-ninth to the children of each of my children who is deceased." Appellant's ward Kitty D. and Douglass C. are the children of Cyrus M., who was one of the children of the testator, and who was then dead. The latter part of this clause, fixing the shares of each, is in conflict and utterly inconsistent with the idea that appellant's ward

was excluded from any share in the estate; and the quantity of the shares, being subsequent and posterior in local position to the names, must supersede as the last expressed will. The rule in the construction of wills, in this respect, is the reverse of the rule in the construction of deeds. In the latter, the first provision in local position controls, for the reason that the grantor has disposed of his interest, and has no further interest to subsequently convey, while in a will the testator retains the right as long as he lives to change and subsequently regive his property. Therefore, the authorities cited by appellees in relation to the construction of conveyances are not applicable to the construction of wills.

Appellant's ward is expressly included in the concluding clause of the third item of the will, as one of the children of Cyrus M. Moore, deceased; and we think that it will not do to say, by conjecture, that she is excluded because her name is omitted in the first clause of the item. See the authorities cited under the above stated third rule of construction.

The construction we have given the will gives effect to each part thereof. The allowing of appellant's ward to take equal with Douglass C., as one of the children of Cyrus M., does not disinherit Douglass C., but leaves him to stand as one of the legatees under the first and last clauses of said third item of the will, but only gives him half instead of all of said ninth share; while the construction contended for by appellees would give him all of said share, and exclude appellant's ward from any part. Such a construction, as claimed by appellees, ought not to be given, unless it is in accordance with the plainly expressed or implied intention of the testator, which we do not think it would be in this case.

Taking the whole will together, we think that in stating the names of the legatees, the name of appellant's ward was omitted through mistake, and that it was not done with an intention to disinherit her. Such an intention would be contrary to natural justice, and no reason is given for its existence.

We therefore conclude that the will ought to be so con-

strued as to supply the omission, and give to appellant's ward an equal share with Douglass C. in the one-ninth share of the balance of the estate after Rachel's specific legacy is paid.

This we think is doing equal justice to all the testator's children and grandchildren, and is in accordance with the general spirit and intention of the testator as expressed in his will, or is plainly inferable therefrom.

The court erred in sustaining the demurrer to the complaint, and for this error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at the costs of the appellees, and that the cause be remanded with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

Filed Jan. 24, 1884. Petition for a rehearing overruled April 2, 1884.

No. 11,556.

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143 227

MITCHELL v. GREGORY ET AL.

SUPREME COURT.—*Appeal.—To Stay Proceedings Bond must be Filed.—Mandate Against Clerk.*—Where an appeal to the Supreme Court is taken, during term time, from a judgment for costs, and time is granted for the filing of an appeal bond, execution will not be stayed until such bond is filed; and, if such bond be not filed, the clerk of the court below may be compelled, by mandate, to issue such execution, though the time for filing such bond has not yet expired.

From the Superior Court of Tippecanoe County.

W. C. Mitchell, for appellant.

R. C. Gregory and *W. B. Gregory*, for appellees.

NIBLACK, J.—On the 8th day of March, 1884, in a certain action theretofore pending in the Superior Court of Tippecanoe county, the defendants recovered judgment against the plaintiffs for costs of suit, and the plaintiffs prayed an appeal to

this court, which was granted, and thirty days were given within which to file an appeal bond, with penalty fixed and surety named and approved by the court.

The appellant, William C. Mitchell, was at the time, and still continues to be, the clerk of the court in which the judgment was rendered. After the close of the term, and before an appeal bond was filed, that is to say, on the 19th day of said month of March, the defendants in the action so resulting in a judgment in their favor, filed a præcipe with the appellant as such clerk, and demanded the issuance of an execution upon the judgment, but the appellant refused to issue an execution, upon the ground that the time within which the plaintiffs had leave to file an appeal bond had not expired. This action was then commenced to obtain a writ of mandate against the appellant, requiring him to issue an execution on the judgment. The appellant appeared to the complaint, and, upon a hearing, he was ordered to issue an execution, as he had been previously so requested to do.

So much of section 638, R. S. 1881, as has a direct application to the facts of this case, is as follows:

"When an appeal is taken during the term at which judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, with such penalty and surety as the court shall approve, and within such time as it shall direct, payable to the appellee, with condition that he will duly prosecute his appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against him. * * * * The transcript shall be filed in the office of the clerk of the Supreme Court within sixty days after filing the bond."

Under the provisions of section 641 of the same statutes, an appeal, after the close of the term, does not stay execution or other proceedings in the court below, unless an order for such a stay of proceedings be granted by this court, or some judge thereof, and when such an order is made it must direct

that the appellant shall give bond to the appellee with such condition as is required when an appeal is taken during the term at which the judgment is rendered.

This court, so far as our information extends, has always acted upon the assumption that a supersedeas for the stay of proceedings below is not complete until a supersedeas bond is filed in accordance with the order requiring such a bond to be filed, and that assumption has an unquestioned support in the codes of both 1852 and 1881.

A similar rule of construction ought, we think, to be applied to appeals taken during the term. Section 638, *supra*, declares, as has been seen, that an appeal taken during the term "shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant." It is true that the section also authorizes the court to grant an extension of time within which an appeal bond may be given, but that does not modify the declaration that the appeal shall operate to stay proceedings "upon an appeal bond being filed." It is, in our opinion, the bond in both instances which consummates the appellant's right to a stay of proceedings and ties the hands of the appellee. Any other construction might deprive the appellee of any security whatever, since there is no limit as to the time within which the court may authorize an appeal bond to be filed after the expiration of the term.

In commenting upon the sections of the code of 1852, corresponding to those of 1881, now under consideration, this court, in the case of *Burk* v. *Howard*, 15 Ind. 219, held that there was, under the sections then before the court, but one instance in which an appellant could have the proceedings in the lower court stayed without an order of this court in term, or one of its judges in vacation, and that was when the appeal was granted during the term, and bond filed, with such penalty and surety as the court should approve, within the time limited by the court. This case was cited approvingly by the subsequent cases of *Jones* v. *Droneberger*, 23 Ind. 74, and of

Ham v. *Greve*, 41 Ind. 531, and in principle fully sustains the conclusion we have reached in this case. See, also, *Willson* v. *Binford*, 54 Ind. 569.

The judgment is affirmed, with costs.

Filed April 3, 1884.

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No. 10,785.

THE STATE, EX REL. BRADEN, *v.* KRUG ET AL.

FORMER ADJUDICATION.—Whenever a matter is adjudicated and finally determined by a court of competent jurisdiction, it is forever at rest.

SAME.—*Grounds of Former Decision.*—In the trial court, final judgment was rendered against the plaintiff upon the overruling of the demurrer to the answer for insufficiency, and, upon his appeal to the Supreme Court, the judgment below was affirmed upon the ground that such demurrer should have been carried back to the complaint and sustained, whereupon the plaintiff commenced a new action for the same cause, and the defendants properly pleaded such former adjudication.

Held, that the answer is sufficient.

SAME.—*Who may Plead Former Adjudication.*—A former adjudication in favor of several defendants is a good defence to a subsequent action upon the same cause against any of such defendants.

From the Montgomery Circuit Court.

E. C. Snyder, for appellant.

G. W. Paul, M. D. White, J. E. Humphries, W. C. Wilson, and *J. H. Adams*, for appellees.

HAMMOND, J.—This was an action against the appellees Krug and his sureties, upon his official bond as sheriff of Montgomery county. The complaint was in two paragraphs. The first alleged, in substance, that on January 18th, 1879, one William B. Patch made an assignment of all his property to the relator for the benefit of the assignor's creditors, which assignment was duly recorded ten days afterwards; that after the making and recording of the assignment, a judgment was recovered against Patch in the Montgomery Circuit Court; that an execution issued on said judgment

and was placed in the hands of Krug as such sheriff, and was by him wrongfully levied upon certain personal property, of the value of $5,000, which had been assigned to the relator as aforesaid; and that said Krug wrongfully sold said property, to the relator's damage, etc.

The second paragraph of the complaint is the same as the first except that it simply avers that the relator was the owner of the property, without giving the source of his title.

The appellees answered in five paragraphs, the second, third and fourth of which were subsequently withdrawn.

The appellant demurred separately to the first and fifth paragraphs of the answer for want of facts. The demurrer was overruled. The appellant excepted, and, declining to reply, judgment was rendered in favor of the appellees for costs. The ruling upon the demurrer constitutes the alleged error complained of in this court.

The first and fifth paragraphs of answer were pleaded as a former adjudication. The facts alleged were substantially alike in both paragraphs, and were in effect as follows:

That the relator never had any claim to the property levied upon and sold by Krug, except as assignee of Patch; that after it was levied upon and sold, as alleged in the appellant's complaint, said appellant, on the relation of said relator, filed in the court below a complaint against the appellees and one David Enoch on the bond now in suit, alleging in said complaint the same facts as are set up in the present complaint as a breach of the conditions of said bond; that the defendants in said action appeared thereto, and filed a demurrer to the complaint, which the court overruled, and to which ruling said defendants excepted, and filed an answer in four paragraphs, one being the general denial and the others specially pleading facts showing that the relator had no title to the property except such as he derived by virtue of the assignment from Patch, and that such assignment was fraudulent and void as to Patch's creditors; that the appellant in said action demurred separately to the special paragraphs

of answer for want of facts to constitute a defence, which demurrer was overruled, and the appellant excepted to the ruling and replied by the general denial; that upon the issues thus made the case was tried by the court, by agreement of parties; that the appellant introduced evidence tending to prove the allegations of the complaint, and that the same personal property described in the complaint in the present case, and no other or different property, had been levied on and sold by Krug as such sheriff, as alleged in the complaint in the former action, and in the complaint in the present suit; that the defendants in said cause thereupon introduced evidence tending to prove the allegations of the several paragraphs of their answer; that the court trying the cause, after hearing all the evidence and being duly advised in the premises, found for the defendants, and rendered judgment accordingly; that the appellant, on the relation aforesaid, appealed said cause to the Supreme Court, assigning for error the overruling of its demurrer to the special paragraphs of answer; that upon submission the Supreme Court affirmed the judgment of the court below, not upon the errors assigned, but upon the ground that the appellant could not complain of the overruling by the court below of the demurrer to the affirmative paragraphs of answer, for the reason that the appellant's complaint in said case did not state facts sufficient to constitute a cause of action in this, that said complaint gave no specific description of the property levied upon and sold by the sheriff, did not set out a copy of the assignment under which the relator claimed the property, and did not aver that such assignment was executed and recorded before the issuing and levying of the execution complained of. It is further averred that on the trial of said cause the appellant introduced in evidence said assignment, with evidence tending to prove its execution and recording; and also introduced evidence tending to prove a specific description of the property and its value, which was charged in the former and present action to have been

levied upon and sold by the sheriff. The fifth paragraph of the answer in the present case closes as follows:

"And the defendants herein further aver that the levy, seizure and conversion by the defendant sheriff Krug, of the personal property specifically described in the complaint, as the property of the relator Braden, and as alleged in the complaint in this cause, and for which a judgment in damages is sought to be recovered, are one and the same levy, seizure and conversion of the same property by the defendant sheriff Krug, for which a judgment in damages was sought to be recovered in said former action so tried and determined as aforesaid.

"And the defendants herein further aver that all the matters alleged in the complaint in this cause are the same matters which were fully heard and determined on the trial of said former action; wherefore the defendants pray judgment."

The case referred to as having been appealed to and affirmed by this court is *State, ex rel.*, v. *Krug*, 82 Ind. 58.

It was said in *Fischli* v. *Fischli*, 1 Blackf. 360 (12 Am. Dec. 251), that "whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case." The law as thus announced in the early history of the State has, in subsequent decisions of this court, been uniformly adhered to. *Crosby* v. *Jeroloman*, 37 Ind. 264; *Bates* v. *Spooner*, 45 Ind. 489; *Greenup* v. *Crooks*, 50 Ind. 410; *Burk* v. *Hill*, 55 Ind. 419; *Richardson* v. *Jones*, 58 Ind. 240; *Griffin* v. *Wallace*, 66 Ind. 410; *Green* v. *Glynn*, 71 Ind. 336; *Hays* v. *Carr*, 83 Ind. 275; *Sauer* v. *Twining*, 81 Ind. 366; *Goble* v. *Dillon*, 86 Ind. 327 (44 Am. R. 308).

The conclusiveness of a judgment as between the parties

thereto is well stated in *Hollister* v. *Abbott*, 11 Foster (N. H.) 442. "It is," says the court in that case, "a well established principle that the judgment of a court of record having jurisdiction of the cause and of the parties, is binding and conclusive upon parties and privies in every other court, until it is regularly reversed by some court having jurisdiction for that purpose. Nothwithstanding the proceedings may be erroneous, yet as between the parties the judgment must stand until regularly vacated or reversed. Where a court has jurisdiction, it has a right to decide every question which arises in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them, in a court having jurisdiction of them and of the subject-matter. The only way for them to investigate such a judgment is by a rehearing of that cause either by writ of error or some other legal and direct mode; for to the extent to which the judgment goes, their rights have been considered and decided; and they have submitted to that decision, either from the force of law after a final hearing by a court of last resort, or from a disinclination to pursue the matter further, when other courses of procedure for rehearings were opened before them, and might have been had if they had so elected. Upon this point the authorities are numerous and decisive." See, also, Wells Res Adjudicata, sections 1–14, and Freeman Judg., section 260.

The conclusiveness of a judgment recovered in a case where the court had jurisdiction of the parties and the subject-matter of the action is not affected by the insufficiency of the complaint upon which it was rendered. *Abdil* v. *Abdil*, 33 Ind. 460; *Fritz* v. *State*, 40 Ind. 18; *State* v. *George*, 53 Ind. 434.

To make a plea of former adjudication good, it is not essential that all the parties in the former suit should be parties in the action where such plea is set up. It is sufficient

as to all who were parties in both actions. 1 Works Pr., section 605.

An appeal to the Supreme Court does not affect the binding force of a judgment until it is reversed. It was said in *Nill* v. *Comparet*, 16 Ind. 107, that "the only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects, the judgment, until annulled or reversed, stands binding upon the parties, as to every question directly decided." To the same effect also are *Burton* v. *Burton*, 28 Ind. 342, *Brooks* v. *Harris*, 41 Ind. 390, and *Mull* v. *McKnight*, 67 Ind. 525.

If an appeal does not destroy the binding force of a judgment, then certainly the affirmance of the judgment on appeal can not have that effect. A general judgment in the trial court decides all the issues in favor of the successful party.

The affirmance of the judgment on appeal, without reference to the ground upon which it is placed, leaves it in full force precisely the same as though no appeal had been taken. *Finch* v. *Hollinger*, 46 Iowa, 216; *Trescott* v. *Barnes*, 51 Iowa, 409.

The first and fifth paragraphs of the appellees' answer show that all the parties to the present action were parties to the former suit; that the causes of action in both suits were identical; that the former case was fully tried upon its merits, even as to questions of fact in which the complaint was insufficient; and that a judgment was rendered in favor of the appellees. That judgment can not be collaterally attacked. It is conclusive between the parties, and a complete bar to the present action. There was no error in overruling the appellant's demurrer to the first and fifth paragraphs of the answer.

Affirmed, with costs.

Filed March 29, 1884.

No. 10,742.

THE STATE, EX REL. DUNHAM, *v.* ROCHE, ADMINISTRATOR, ET AL.

PLEADING.—*Answer to Suit on Bond.*—In a suit upon a bond each breach assigned, with the introductory averments, is regarded as a separate paragraph of complaint, with a view to making issue, and an answer in bar of the whole action, not sufficient as to one of the breaches assigned, is bad on demurrer.

PRACTICE.—*Waiver.*—A defendant who obtains an order on the plaintiff to separate his causes of action and have them separately docketed, and then pleads to the whole complaint, without taking action to enforce the order, waives it.

SAME.—*Harmless Error.*—When the general denial is pleaded, it is a harmless error to sustain a demurrer to another paragraph merely alleging facts equivalent to the denial or admissible in evidence under it.

SAME.—*Payment.*—In a suit on a guardian's bond, for conversion of the ward's money and a failure to pay, etc., payment in whole or in part is provable under the general denial.

GUARDIANSHIP.—*Filing Accounts.*—Where a guardian files accounts of his guardianship as required by law, and the court makes no order approving them, such reports conclude nobody.

SAME.—*Education and Maintenance.*—A guardian is not entitled to credit for sums expended in the education and maintenance of his ward, unless the ward had no parents able to provide therefor, or unless such parents were unwilling to do so.

SAME.—*Bond.—Approval.—Complaint.*—A complaint on a guardian's bond, which exhibits a copy of the bond and the clerk's approval thereof, sufficiently shows that the bond was approved.

From the Huntington Circuit Court.

W. H. Trammel and *T. L. Lucas*, for appellant.

J. B. Kenner and *J. I. Dille*, for appellees.

COLERICK, C.—This was an action brought by the appellant against the appellees upon a bond executed by Mahon as guardian of the relatrix, and by DeLong as surety. The complaint, in substance, averred that Mahon was, on the 10th day of October, 1871, duly appointed by the clerk of the court of common pleas of Huntington county, Indiana, guardian of the person and property of the relatrix, and filed his

bond as such guardian, conditioned for the faithful performance of his duties, with DeLong as surety thereon, a copy of which bond is filed with and made a part of the complaint, by which it appears that the bond was approved by the clerk of said court; that said guardian entered upon the duties of his trust, and continued to perform the same until the 18th day of May, 1874, when he died, and that afterwards the appellee Roche was duly appointed administrator of his estate, and is now acting in said capacity. It is then averred that said Mahon failed to perform faithfully his duties as such guardian, and seven breaches of the condition of said bond are assigned, all of which, except the seventh, related to sums of money, which, it was alleged, had been received by said guardian and converted to his own use, and that he did not, in his lifetime, nor have the appellees, or either of them, since his death, accounted and paid to the relatrix, or any person authorized to receive the same, said sums of money, or any part thereof.

The seventh breach assigned was as follows:

"7th. That while and during the time that said decedent was guardian of relatrix and her estate as aforesaid, relatrix was the owner in fee simple of the undivided third part of certain large tracts of real estate, situated in Jackson and Union townships, in Huntington county, Indiana, amounting, in the aggregate, to nine hundred acres of land, which was principally valuable for the large amount of excellent green, growing and valuable timber thereon; that said guardian, who claimed to own the other two-thirds part of said real estate in his own right, disregarding his duties as such guardian, negligently cut down, destroyed, hauled off and removed from the whole of said land all of said green, growing and valuable timber, and sold and converted the same to his own use, and by so removing said timber greatly depreciated the value of relatrix's said land, to her great loss and damage in the sum of $5,000; no part of which has ever been paid or accounted

for by said guardian or said defendants to relatrix, or any one having authority to receive the same."

A motion was made by the appellees to require the appellant to separate her causes of action, and have them separately docketed. The motion was sustained, but the record fails to show that the order so made was complied with. We infer from the record that the appellees waived its enforcement, as it appears that the appellees, without taking any action to enforce the order, filed their separate answers to the original complaint, which is the only complaint in the record. The order was made at their instance and for their benefit. They had the right to waive its enforcement, and did do so, in the manner stated. It is now too late for them to complain of its non-enforcement.

Each of the separate answers so filed consisted of two paragraphs. The first paragraph of each was a general denial. The second paragraph of DeLong's answer, after admitting the appointment of Mahon as such guardian, and the execution of the bond sued upon, averred that said guardian duly reported to said court his proceedings as such guardian, as required by law, in two biennial reports, to wit, on the — day of ———, 18—, and on the — day of ———, 18—, and that said Mahon continued to execute the duties of his said trust until the 4th day of February, 1871, when the appellee was, by said court, released from his suretyship on said bond upon his own petition therefor; that prior thereto, and while said bond was in force, said guardian contracted a large debt, to wit, $1,200, "in and about and for the proper education, care and maintenance of his said ward, to one Ruth Bryan, principal of a female seminary at Batavia, New York; that said ward's estate at said time consisted almost wholly of real estate, and no money, and in order to properly educate and care for said ward, according to her circumstances and station in life, said guardian became personally responsible for said education and care; that a judgment was taken against him personally for said amount of $1,073.39, which amount

was wholly for the care, education and maintenance of said ward, and in favor of said Ruth Bryan," and that before said judgment was paid said guardian died, and that afterwards the administrator of his estate paid $600 on said judgment, and that the residue thereof is still a judgment against his estate. It is then averred that said administrator paid over to the relatrix, or for her use, $310, which sum was the full amount due to her, as shown by said reports, and for which sums the appellees asked to have credit, and prayed that said judgment might be credited on whatever sum was found due to the relatrix on said bond.

The second paragraph of the separate answer of Roche averred, in substance, that Mahon as such guardian, reported to said court his proceedings therein, as required by law, in two biennial reports, to wit, on the —— day of ———, and on the —— day of ———; that during the time that said Mahon was such guardian he contracted a debt for the support and education of the relatrix with one Ruth Bryan, principal of a female seminary in Batavia, New York, to the amount of $1,200; there being no money on hand and the education of said ward being necessary, said guardian gave his personal obligation to said Ruth Bryan for said education and support, and permitted a judgment to be taken against him personally, in the sum of $1,068, of which $600 was paid by Roche, as such administrator, and that the balance of the judgment had been assigned by her to S. R. Alden, for a valuable consideration. It then averred that Mahon "as guardian, duly made, while guardian, his reports according to law, and by said reports, which were never set aside, he showed that he had at the date of his last report, to wit, February 10th, 1872, in his hands $178.41, but that said $178.41 was after said term fully paid by Roche, administrator of the estate of Mahon; that at the death of said guardian, which was during said guardianship, said Mahon had no money of said relatrix in his hands, and that he should

have credit for the amount of $1,068," being the judgment so rendered against him.

Demurrers to the second paragraph of each of said separate answers were overruled, to which rulings exceptions were properly reserved, and thereupon a reply was filed to said special paragraphs. The issues so formed were submitted to a jury for trial, and resulted in the rendition of a verdict in favor of the appellees, and, over a motion for a new trial, judgment was rendered in their favor, from which the appellant appeals, and assigns as errors for the reversal of the judgment the rulings upon said demurrers, and on the motion for a new trial.

In an action on a bond, where several breaches are assigned, each breach so assigned, taken in connection with the introductory averments in the complaint, is to be regarded, for the purpose of forming the issues to be tried, as a separate paragraph of the complaint, and as constituting a distinct cause of action. See *Reno* v. *Tyson*, 24 Ind. 56; *Colburn* v. *State, ex rel.*, 47 Ind. 310; *Boden* v. *Dill*, 58 Ind. 273; *Mustard* v. *Hoppess*, 69 Ind. 324. In this case the special paragraphs of the answers, to which the demurrers were overruled, purported to answer the entire complaint, embracing all the breaches assigned as causes of action, when, in fact, they were not answers to the seventh breach above set forth, and can not be so construed. That a pleading purporting to answer the whole complaint, and only answering a part, is bad on demurrer, has been often decided by this court. As was said in *Frazee* v. *Frazee*, 70 Ind. 411, "There is no rule of pleading more fully recognized and settled by the decisions of this court than this, that each paragraph of an answer must fully answer the entire complaint, or so much thereof as it purports to answer, or it will be held bad on a demurrer thereto for the want of sufficient facts." Where it appears that this rule is violated in any paragraph of an answer, the paragraph must be held bad on demurrer thereto. The appellees insist that the special paragraphs were good as general denials. The first par-

agraph of each of the separate answers was a general denial; therefore, if the position assumed by counsel is correct, the appellees would not have been harmed if the demurrers had been sustained. Conceding that the facts averred in the special answers were admissible under the general denial, still it was error to overrule the demurrers, because the facts therein stated were pleaded in bar of the action, and were not, as we have held, sufficient for that purpose. In *Kernodle* v. *Caldwell*, 46 Ind. 153, it was held, by this court, that it was error to overrule a demurrer to a special paragraph of a reply, if the facts are not sufficient to bar the action, though proof of the facts might be admissible under the general issue. And in *Charles* v. *Malott*, 51 Ind. 350, a like ruling was made as to a special paragraph of an answer. We adhere to these rulings, as they establish or recognize a correct and reasonable rule to be applied to such pleadings.

It is asserted by the appellees that the special paragraphs were good pleas of part payment. It was averred in the complaint that Mahon, as such guardian, had received sums of money belonging to the relatrix, and converted the same to his own use, and that he did not in his lifetime, nor did the appellees since his death, account or pay to the relatrix, or any person authorized to receive the same, said sums of money, or any part thereof. The appellees, under their answers of general denial, had the right to meet the appellant's evidence in support of these averments, by proof that said sums of money, or parts thereof, were accounted for and paid to the proper person. Again, if considered as pleas of payment, they were bad, because they professed to answer the entire demand sued for, when, in fact, they were only answers to a part of the demand, as appears on the face of the answers. Under a plea of payment in full, proof of payment in part may be made. *Ballard* v. *Turner*, 58 Ind. 127. But an answer averring payment in part is not good when pleaded, as in this case, in bar of the entire claim. It is also contended by the appellees that the special paragraphs were good, because they

averred that Mahon, as such guardian, reported to the proper court the estate of his ward, according to law, and that the reports so made were approved by the court, and had never been set aside, and that the balance due to the ward, as shown by the reports, had been paid to her. The appellees' counsel, assuming that these facts were averred in the answers, assert that it is a well settled principle of law that current reports and orders, although only interlocutory and subject to modification by the court on a proper application, are conclusive, as other judgments, when collaterally attacked in a suit upon the bond. If the principle of law invoked is applicable to reports like these, upon which question we express no opinion, it is sufficient to say that it can not be applied in this case, as there is no averment in the answer, as asserted by the appellees, that the reports were ever approved by the court; it is merely alleged that the reports were made. It is the order of the court approving the report, which, being in the nature of a judgment, precludes a collateral attack. In this case, it is not alleged that any such order was made, and, therefore, the principle of law upon which the appellees rely, if otherwise applicable, can not be applied. The appellees also insist that the answers were good, because they averred that for the necessary education and support of his ward the guardian expended $1,068, for which his estate claims credit. A like question was presented to this court at its present term in an action wherein the same parties in this case, except DeLong, were the parties, and founded upon a bond executed by the same guardian. It was decided in that case that an answer, similar to those now under consideration, was insufficient, because it contained no averment that the relatrix had no father or mother at the time the guardian provided board and tuition for her, nor that they were unable or unwilling to furnish her such board and tuition. See *State, ex rel.*, v. *Roche*, 91 Ind. 406. It does appear by the averments in the complaint in this action, that the father of the relatrix was not living at the time said indebtedness was incurred, but there is no allega-

tion, either in the complaint or answers, that the mother of the relatrix was not living, nor that she was unable or unwilling to furnish such board and tuition, nor were facts equivalent to such an averment stated. We think, for the reasons named, that the answers were insufficient.

It is last contended by the appellees that if the answers were bad, they were good enough for a bad complaint, and insist that the complaint in this case was insufficient, because it did not aver that the bond sued upon had been duly approved. We think it sufficiently appears by the averments in the complaint that the bond was properly approved.

For the error committed by the court in overruling said demurrers the judgment must be reversed.

The other errors assigned relate to rulings that were made by the court on the admission of evidence, and to instructions that were given, refused, and modified. As these questions will not probably arise in another trial, it is unnecessary, in view of the conclusion reached by us, to consider or determine them.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellees, and the cause is remanded, with instructions to the court to sustain the demurrers to the second paragraph of each of said separate answers and for further proceedings in accordance with this opinion.

Filed April 4, 1884.

No. 10,637.

SMITH ET AL. *v.* COTTRELL.

94 379
126 104
94 379
128 308

MORTGAGE.—*Lis Pendens.—Notice.—New Trial as of Right.—Statute Construed.*—Where one brings ejectment and is defeated, and within the year allowed by statute takes a new trial upon which he recovers, a mortgagee with actual notice, who takes his mortgage after the first judgment and before the new trial is taken, is not protected by section 1066, R. S. 1881, as having acquired an interest in good faith.

From the Warrick Circuit Court.

E. Gough and *W. H. Patterson*, for appellants.
C. W. Armstrong and *J. B. Cockrum*, for appellee.

BICKNELL, C. C.—The appellee filed a complaint to foreclose a mortgage executed to him by the appellant Brandsasse and his wife to secure the promissory note of Brandsasse. The appellant Smith was made a defendant to answer as to his interest.

Brandsasse was defaulted; the suit was abated as to his wife by her death. Smith answered, alleging that he, as owner of the land in dispute, brought an action of ejectment against Brandsasse, in which he was defeated; that afterwards Brandsasse and wife gave plaintiff the mortgage now in suit, which the plaintiff received with full knowledge of said ejectment suit; that within a year after the rendition of the judgment in the ejectment suit, this defendant took a new trial of that suit as of right, which resulted in favor of this defendant, and final judgment was rendered therein, quieting this defendant's title.

The plaintiff replied admitting all the facts alleged in said answer, and stating expressly that "he had actual notice of said ejectment suit," and stating also that the plaintiff, after the first trial of said ejectment suit, relying on said quieting of the title of Brandsasse, and supposing the controversy at an end between Smith and Brandsasse, lent the latter $200 and took therefor the mortgage in suit as security; that Smith took his new trial of the ejectment suit after the execution of said mortgage, and after the close of the term at which the judgment in favor of Brandsasse was rendered, but within the year prescribed by the statute. The reply demanded that the plaintiff's mortgage should be declared a superior lien to Smith's interest in the land.

To this reply the defendant Smith demurred. The demurrer was overruled, and judgment was rendered against the defendants.

Smith assigns as error the overruling of his demurrer.

The question presented requires a construction of section 1066 of the R. S. 1881, in reference to new trials as of right in actions of ejectment. The section is as follows:

"1066. The result of the new trial, if application therefor is made after the close of the term at which the judgment rendered, shall in no case affect the interest of third persons, acquired in good faith, for a valuable consideration, since the former trial."

Under this section the purchase which is not to be affected by the new trial is not merely a purchase for a valuable consideration; it must be also a purchase in good faith.

A party who buys with notice of a prior right is not a purchaser in good faith; this was held by Lord HARDWICKE in *LeNeve* v. *LeNeve*, Ambler 436; S. C., 3 Atk. 646; 1 Vesey, 64.

Notice, in such cases, may be either actual or constructive; but in the present case it is not a question of constructive notice; the reply expressly admits that "the plaintiff had actual notice of said suit."

It is not good faith to buy property with actual knowledge of an adverse claim thereto not yet determined. Therefore, ordinarily, a transfer *pendente lite* of the property in litigation by a party to the suit has no effect upon the litigation, and ordinarily, in equity, *lis pendens* is constructive notice, although there be no actual notice. *Murray* v. *Ballou*, 1 Johns. Ch. 566. In Indiana, a *lis pendens* is constructive notice now, if the statutory provisions are fulfilled. R. S. 1881, sections 325 to 331. But here was actual notice; the plaintiff here, having actual notice of the ejectment suit, knew also that the plaintiff in that suit was entitled, as of right, to a new trial on payment of the costs. He knew that the property upon which he advanced his money was in litigation, which was not yet finally determined. It was held by Lord REDESDALE, that although a bill has been dismissed a party purchasing after dismissal will be a purchaser *pendente lite*, if an appeal be afterwards taken to the House of Lords, since it was

still a question whether the bill was rightly dismissed, and the parties thus having notice must take subject to all the legal and equitable consequences. *Gore* v. *Stacpoole*, 1 Dow, 18, 31; 3 Sugden Vendors, p. 459. So as to a purchaser during the temporary abatement of a suit, where there has been no laches in reviving it. 2 White & Tudor Eq. Cas., p. 126. A party who makes his motion for a new trial within the statutory time is not guilty of laches, although under section 1066, *supra*, he is not protected against a purchaser in good faith.

In *Vattier* v. *Hinde*, 7 Peters, 252, 279, MARSHALL, C. J., says: "The rules respecting a purchaser without notice, are framed for the protection of him who purchases a legal estate and pays the purchase-money without knowledge of an outstanding equity. * * Even the purchaser of an equity is bound to take notice of any prior equity. * * But there is, we think, much reason to believe that he" (the purchaser) "had actual notice of that equity; or, at any rate, was informed of circumstances which ought to have led to such inquiry as would have obtained full notice."

Mr. Story says: "The taking of a legal estate, after notice of a prior right, makes a person *mala fide* purchaser." 1 Story Eq. Jur., sec. 397. "Particular persons, in contracts, and other acts, shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect to other persons, who stand in such relation to either, as to be affected by the contract or consequences of it." Story Eq. Jur., section 333.

We think the plaintiff, when he took his mortgage, did not acquire an interest "in good faith" within the meaning of section 1066, R. S. 1881. The court therefore erred in overruling the demurrer to the reply, and for this error the judgment must be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the

same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to sustain the demurrer of the defendant Smith to the reply to the second paragraph of said Smith's answer.

Filed April 4, 1884.

No. 10,722.

ANDREWS v. FLANAGAN ET UX.

FRAUDULENT CONVEYANCE.—*Evidence.*—To authorize the setting aside of a conveyance as fraudulent, the evidence must show that the grantor, at the time of its execution, did not have enough other property subject to execution to pay his debts, and that the conveyance was either without consideration, or that the grantee accepted it with knowledge of the grantor's fraudulent purpose.

From the Cass Circuit Court.

W. A. Kearney, for appellant.

D. D. Dykeman and *M. Winfield*, for appellees.

HAMMOND, J.—This was an action by the appellant to recover upon a judgment previously obtained by him against the appellee George W. Flanagan and to subject to its payment certain real estate alleged to have been fraudulently conveyed. The case was put at issue and tried by a jury who returned a verdict for the appellee Eliza A. Flanagan, and for the appellant for the amount of his judgment as against said George W. Flanagan. Over the appellant's motion for a new trial, judgment was rendered upon the verdict.

The only question made in the appellant's brief is as to the sufficiency of the evidence to sustain the verdict as to the appellee Eliza A.

It was shown in evidence that during the pendency of the action in which the judgment declared upon was recovered, the appellee George W. conveyed the real estate in controversy, through a trustee, to his wife, the appellee Eliza A. The transaction is not wholly without suspicion, but we are

unable to say that the evidence of fraud was sufficient to authorize the jury to declare the conveyance void.

To authorize the setting aside of a conveyance as fraudulent, the evidence must show that the grantor, at the time of making it, did not have enough other property subject to execution to pay his debts, and that the conveyance was either without consideration, or that the grantee accepted it with knowledge of the grantor's fraudulent purpose. *Pennington* v. *Flock*, 93 Ind. 378. The proof in this case, upon the points above suggested, was unsatisfactory. Fraud is not presumed, but must be proved by the party alleging its existence. It was not so clearly proved in the case before us as to authorize a reversal of the judgment.

Affirmed, at appellant's costs.

Filed April 2, 1884.

94 384
161 242

No. 10,675.

GREGORY *v.* THE STATE, EX REL. GUDGEL.

COUNTY CLERK.—*Ministerial Officer.*—The clerk of the circuit court is a ministerial officer only, and can not exercise a judicial function.

SAME.—*Bail.*—*Judicial Act.*—Fixing the amount of bail is a judicial function, and can not be performed by the clerk of a circuit court.

SAME.—*Section 1684 Unconstitutional in Part.*—That clause of section 1684, R. S. 1881, authorizing the clerk to "fix the amount of bail," is unconstitutional and void.

From the Posey Circuit Court.

A. P. Hovey and *G. V. Menzies*, for appellant.

W. H. Gudgel, Prosecuting Attorney, for appellee.

ELLIOTT, J.—The ruling question in this case is this: Is the statute providing that county clerks may fix bail in cases of persons accused of crime constitutional?

Our Constitution, in strong terms, declares that judicial powers shall be vested in courts, and not in ministerial officers. Its framers were careful to clearly mark out the differ-

ent departments of government, and to firmly prohibit the lodging of judicial powers elsewhere than in judicial tribunals. Our decisions have given full effect to our constitutional provisions, and have uniformly declared that only judicial officers can exercise judicial functions. *Little* v. *State*, 90 Ind. 338; *Shoultz* v. *McPheeters*, 79 Ind. 373; *Wright* v. *Defrees*, 8 Ind. 298; *Waldo* v. *Wallace*, 12 Ind. 569; *Columbus, etc., R. W. Co.* v. *Board, etc.*, 65 Ind. 427.

Clerks are ministerial officers. *Gulick* v. *New*, 14 Ind. 93. If, therefore, the power to fix bail is a judicial one, it can not be conferred upon clerks or other ministerial officers.

It becomes necessary to examine the subject of admitting to bail, for if it be found that the power of admitting to bail is a judicial one, then the statute which assumes to confer it upon clerks is unconstitutional. The text-writers uniformly treat the power to settle bail as a judicial one, to be exercised by an officer capable of receiving judicial powers. Blackstone says: "Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate, but most usually by justices of the peace." 4 Blackstone Com. 297. In another English book it is spoken of as one of the most important branches of magisterial jurisdiction. 2 Broom & Hadley Com. (Am. ed.) 583. Chitty treats the duty of admitting to bail as a judicial one, and says: "As more immediately connected with our present inquiries, we will first consider the power of justices of the peace, and the incidents of their authority; and then the jurisdiction of other magistrates to bail the supposed offender." 1 Chitty Crim. Law, 92.

The origin of the common law right to give bail and the character of the proceeding are well stated and discussed in the recent work of Mr. Stephen, and he shows that the authority to admit to bail was part of the judicial functions of sheriffs, but that by statute the authority has been gradually vested in superior courts and in those of justices of the peace. 1 Stephen Crim. Law of England, 233. Bishop assumes

that the power is a judicial one, and says: "Anciently the sheriff, possessing judicial with ministerial powers, was the principal bailing officer." 1 Bishop Crim. Proc. 251. In other works the same view is taken, and we have found in none of the text-books any intimation that the power is other than a judicial one. Harris Crim. Law, 255; Barbour Crim. Law, 575. Judge Cooley says: "The magistrate in taking bail exercises an authority essentially judicial." Cooley Const. Lim. (5 ed.) 378, n. 4. This is substantially the remark of Lord DENMAN in *Linford* v. *Fitzroy*, 13 Q. B. 240. This eminent judge there said: "But, upon the fullest consideration, we are of opinion that the duty of the magistrate in respect to admitting to bail can not be thus split and divided; that it is essentially a judicial duty." There was some conflict among the older English cases as to whether the sheriff's judicial powers were sufficiently comprehensive to authorize him to fix bail for persons accused of crime (*Bengough* v. *Rossiter*, 2 H. Bl. 418; *Posteene* v. *Hanson*, 2 Saunders, 59; 1 Chitty Crim. Law, 98), but it was unanimously agreed that the power was a judicial one. In the cases of *State* v. *Mills*, 2 Dev. (N. C.) 555, and *State* v. *Hill*, 3 Iredell, 398, the power of admitting to bail is declared to be a judicial one which a sheriff, or other ministerial officer, can not exercise. In several cases it has been held that the power can not be delegated, for the reason that it is a judicial one. *Jacquemine* v. *State*, 48 Miss. 280; *State* v. *Clark*, 15 Ohio 595; *Morrow* v. *State*, 5 Kan. 563. In *State* v. *Crippen*, 1 Ohio St. 399, it was said: "A recognizance is an obligation of record entered into before some court of record, or magistrate duly authorized, conditioned for the performance of some particular act." The decision in *Solomon* v. *People*, 15 Ill. 291, is that "A recognizance taken before an officer not having judicial power, is without any binding force."

The character of the proceeding is shown by the effect annexed to a recognizance when duly perfected and entered of record. Chief Justice Coke says that they "import in them

such uncontrollable credit and veritie, as they admit no averment, plea, or proofe to the contrarie." Coke Litt. 260 *a*. The cases recognize the correctness of this statement of the law, although, like other general rules, it has exceptions. *State* v. *Wenzel*, 77 Ind. 428; *Adair* v. *State*, 1 Blackf. 200; *McCarty* v. *State*, 1 Blackf. 338; *People* v. *Kane*, 4 Denio, 530. This doctrine is carried very far in *Doe* v. *Harter*, 1 Ind. 427, where it was held that a recognizance could not be collaterally impeached. Our cases have steadily held that a ministerial officer can not take a recognizance unless expressly authorized by statute, and then only when the amount has been fixed by competent authority. They have also as uniformly held that a complaint must show that the recognizance was taken by an officer or court possessing authority. *Trimble* v. *State*, 3 Ind. 151; *Blackman* v. *State*, 12 Ind. 556; *Votaw* v. *State*, 12 Ind. 497; *Myers* v. *State*, 19 Ind. 127; *Hawkins* v. *State*, 24 Ind. 288; *Gachenheimer* v. *State*, 28 Ind. 91; *State* v. *Gachenheimer*, 30 Ind. 63; *Boaz* v. *Tate*, 43 Ind. 60; *State* v. *Wenzel*, 77 Ind. 428. In *State* v. *Winninger*, 81 Ind. 51, it was held that fixing the amount of a recognizance is a judicial act, and this conclusion is fully sustained by the authorities we have cited.

It is clear on principle that the conclusion stated is the correct one. The officer by whom the bail is fixed must determine whether the offence is bailable, and what the amount of the recognizance shall be. Our Constitution provides that excessive bail shall not be exacted, and the officer who fixes the amount must necessarily decide upon what will or will not be excessive bail in each particular case. What would be deemed excessive in one case might be entirely reasonable in another. Bail is to be fixed according to the circumstances of each case, and no general sum can be fixed for all cases. Crimes of the same class often differ greatly in their character, and the good of the public, as well as the constitutional right of the citizen, require that different provisions as to bail shall be made in different cases. The atrocity of some crimes

increases the punishment, and the measure of punishment is always to be considered in determining the amount of bail. The object of requiring bail is to relieve from imprisonment until conviction and yet secure the appearance of the accused for trial, and it is obvious that what would be a sufficient sum in one case would be wholly inadequate in another, and what in one case would be excessive, in another would be insufficient, and that the question as to the amount of bail is, therefore, one for judicial decision. Judge Cooley says: "When bail is allowed, unreasonable bail is not to be required; but the constitutional principle that demands this is one which, from the very nature of the case, addresses itself exclusively to the judicial discretion and sense of justice of the court or magistrate empowered to fix upon the amount. That bail is reasonable which, in view of the nature of the offence, the penalty which the law attaches to it, and the probabilities that guilt will be established on the trial, seems no more than sufficient to secure the party's attendance. In determining this, some regard should be had to the prisoner's pecuniary circumstances; that which is reasonable bail to a man of wealth being equivalent to a denial of right if exacted of a poor man charged with a like offence." Cooley Const. Lim. (5th ed.) 378.

Approving and accepting bail after it has been fixed by competent authority is a ministerial act, and may be performed by the sheriff or other ministerial officer. *Votaw* v. *State, supra; State* v. *Winninger, supra.* But in the case in hand the question is of a very different character, for the point here in issue is as to the competency of the clerk to fix the bail. The determination of the question of the amount of bail is a very different thing from accepting or approving bonds in cases where the statute prescribes what shall be done, and what the character and penalty of the bond shall be. In such cases, there is no exercise of judicial power, but simply a performance of a ministerial act. We have several cases holding that acts of the character indicated may be performed by the clerk, but in all of these cases the court is careful to affirm that he

may perform them, because they are ministerial and not judicial acts. It will be found that these cases, while declaring what are ministerial acts, affirm that the clerk can not be vested with judicial functions. *Pennington* v. *Streight*, 54 Ind. 376; *State, ex rel.*, v. *Jones*, 19 Ind. 356; *Gulick* v. *New*, *supra*; *Brower* v. *O'Brien*, 2 Ind. 423. It is often difficult to draw the line between powers which are *quasi*-judicial and those which are, in a constitutional sense, judicial powers, but we encounter no such difficulty here, for the power to fix bail has always been regarded by the courts and text-writers as a judicial one, and is, in its nature, essentially a judicial power belonging to courts. And, as was said by the court in *Abbott* v. *Mathews*, 26 Mich. 176, "The judicial power, properly so called, has never been vested anywhere but in courts."

The clause of section 1684 of the statute, which assumes to invest clerks with power to fix bail, must be held void.

The replies of the appellee were clearly bad. We may add that the complaint is also defective, for the reason that it does not aver that the bail was fixed by competent authority.

Judgment reversed.

Filed April 2, 1884.

No. 10,395.

STEWART v. MCMAHAN ET AL.

MORTGAGE.—*Priority.—Release as to Second Purchaser Releases First.—Pleading.*—Certain land, encumbered by a recorded mortgage, was platted into town lots by the mortgagor, who sold one lot to M. and then one lot to P., retaining the residue. Each paid for his lot and entered into possession thereof, but P., before paying, required and obtained the release of his lot from such mortgage, his payment exceeding the amount of the mortgage. The mortgagee then transferred the mortgage to S., who had no notice of M.'s purchase, the latter's deed not being on record. S. then foreclosed the mortgage, in an action against the mortgagor and P., and against all of said lots. S. afterwards brought an action against M. and P., to compel the former to redeem and for foreclosure against him, and also to quiet title against P. To an answer by M., setting up the foregoing facts, a demurrer was filed.

Held, that the release of the mortgage as to P. released M. also, and, therefore, that the answer was sufficient.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellant.

C. L. Jewett and *P. H. Jewett*, for appellees.

FRANKLIN, C.—The following are the substantial facts in this case: On the 8th day of May, 1873, Samuel H. Patterson and wife conveyed to Lawrence Schuler certain real estate for the consideration of $2,500. $500 was paid at that time, and a note given for $2,000, secured by a mortgage to Patterson upon the premises, which was duly recorded. In June, 1874, Schuler subdivided the land into town lots, numbered from 1 to 31 inclusive, as an addition to the town of Ohio Falls, adjoining Jeffersonville, and had the plat recorded June 10th, 1874. March 1st, 1875, Schuler sold to appellee McMahan lot No. 3, in said addition, for $250. McMahan paid the purchase-money for the lot in March and April of that year, and contracted with Schuler for Schuler to build him a storehouse and residence on the lot for the sum of $1,400. McMahan took possession of the lot at that time, and, under the purchase, filled up the lot, and Schuler built the storehouse and residence upon it, which McMahan has ever since had possession of. Although the mortgage was recorded, McMahan had no actual notice or knowledge of any mortgage upon the property. He received a deed for the lot from Schuler and wife May 31st, 1875, but did not have it recorded until in 1879. In the summer of the year 1875 he and Schuler settled up for said building, and he gave to Schuler his note for a balance of $1,275, with six per cent. interest, payable in four years. He afterwards made some additional payments on the note, and in 1877 settled and lifted the note by the payment of $50. Schuler was then insolvent, and Patterson in bankruptcy.

On May 28th, 1875, three days before the deed was made to McMahan, Schuler sold seven of said lots to appellee Per-

rin, in exchange for a farm worth $3,500. Perrin learned of the Patterson mortgage upon the lots, and refused to deliver a deed for the farm, or accept a deed for the lots, until the mortgage was removed, or the lots were released from it. Schuler procured Patterson to release these seven lots from the mortgage, delivered the release to Perrin, and the deeds were fully executed.

Patterson borrowed from Mrs. Stewart, the appellant herein, $1,800, for which he gave his note, and transferred to her by endorsement the Schuler note for $2,000, as collateral security for the payment of his note, but made no endorsement upon the mortgage; of which transfer Schuler, Perrin and McMahan knew nothing until about the time of the foreclosure proceedings. Schuler supposed Patterson yet held and owned the note, as he had been regularly paying the interest thereon to him.

In March, 1876, Mrs. Stewart foreclosed the mortgage, making Schuler and wife, and Perrin parties thereto, leaving out McMahan, and took judgment against Schuler for the amount of his note and interest, and a foreclosure of the mortgage against all the defendants. The decree of foreclosure required the twenty-four lots not sold to Perrin, to be first sold to pay the judgment.

On the 13th of January, 1877, the sheriff, after having offered each lot separately, sold all the thirty-one lots *in solido*, without offering the unsold lots separately for sale. Patterson bid the lots off in his own name, as is shown by the return of the sheriff, for enough to pay the judgment and costs; he paid the costs, and procured Mrs. Stewart, the judgment plaintiff, to receipt the sheriff for the amount of the judgment and interest. No deed has been executed in pursuance of this sale. After the sale Perrin proposed to Mrs. Stewart to pay the debt Patterson owed her, if she would transfer or relinquish her interest in the mortgaged property, which she declined to do, alleging as a reason that the property was worth more than her debt, and that she would not

do so without consulting Mr. Patterson, and in January, 1880, commenced this suit against McMahan and Perrin to compel McMahan to redeem, or pay his equitable share of redemption, or to foreclose the mortgage against him, and to quiet her title to the premises. There was a demurrer by McMahan overruled to the complaint.

Perrin answered by a denial, payment, and setting up the release; reply in denial.

McMahan answered in eight paragraphs—the first, a denial; second, payment; the others were special. A demurrer was sustained to the 3d, 4th, 5th and 6th paragraphs, and overruled to the 7th and 8th. Reply in denial of the 2d, 7th and 8th paragraphs.

There was a trial by the court and a finding for the defendants. Over a motion for a new trial, judgment was rendered for defendants for costs.

Appellant has assigned as error the overruling of the demurrers to the 7th and 8th paragraphs of McMahan's answer, and the overruling of the motion for a new trial.

Appellees each have assigned cross errors upon the overruling of the demurrer to the complaint, and that the complaint does not state sufficient facts.

The complaint sets out or avers the execution of the deed from Patterson to Schuler, and the mortgage from Schuler to Patterson, the division of the property into town lots, the sale and conveyance to Perrin of the seven lots on the 28th day of May, 1875, and alleges a sale and conveyance of lot No. 3 to McMahan, on the 31st day of May, 1875, and charges that it, with the improvements, was then worth $1,800, and that McMahan then had notice of plaintiff's mortgage on the premises; the foreclosure of the mortgage without making McMahan a party thereto, because his deed was not recorded, and plaintiff had no actual knowledge of said defendant's ownership to any part of the mortgaged premises; that when said foreclosure proceedings were had, McMahan was indebted to Schuler in the sum of $2,000, for the purchase-money of

the real estate before described—all except $50 yet remains unpaid—the sale of the lots by the sheriff to Patterson on the 13th day of January, 1877, for $2,692, the payment of the costs by Patterson, and the receipt of the plaintiff for the balance of the purchase-money; that the plaintiff received no money whatever by virtue of said sale, nor has she ever received any money whatever since thereon, and the bid made by said Patterson was made in her behalf, and the only money paid was for the costs; that ever since said 31st day of May, 1875, said McMahan has been in the possession of said premises and received the rents and profits thereof; that said mortgage never has been foreclosed to said part of said premises so held and occupied by said McMahan; that said Perrin claims some interest in the matter, and asserts some title to said premises, and he is made a party defendant to assert the same. Prayer, that McMahan may be required, within a reasonable time, to pay into the clerk's office of the court for the use of the plaintiff, the amount of plaintiff's debt, principal, interest and costs, in redemption of said mortgaged premises, and that the plaintiff, on the payment of such sum, or whatever sum said McMahan ought to be equitably required to pay, will convey to said defendant whatever interest she acquired in said part of said mortgaged premises under said sheriff's deed. And that in default of redemption, the title of the plaintiff to all of said mortgaged premises be confirmed and quieted in her, and that the said defendant be forever barred, prohibited and enjoined from setting up or claiming any title thereto, or that said defendant's interest in said mortgaged premises may be foreclosed and sold, etc.

The seventh paragraph of McMahan's answer avers that he purchased said lot 3 in March, 1875, paid the full purchase-price, took possession thereof under said purchase, and made improvements thereon of the value of $1,400, received a deed therefor from Schuler and wife May 31st, 1875; that on the 28th day of May, 1875, said Schuler sold to his co-de-

fendant Perrin seven of said lots, that were of the value of $3,000, which were included in said plaintiff's mortgage; that said Patterson was then and there the owner and holder of said note and mortgage named in the complaint, and with full notice of this defendant's rights and purchase as aforesaid, executed and delivered to said Perrin a release for value received of said seven lots from said mortgage, and thereby released this defendant's said property from any liability upon said mortgage; and that said Patterson afterwards deposited said note and mortgage with said appellant as collateral security for the payment of a loan of $1,800; that said loan is yet continued, and said Patterson has kept the interest thereon ever since paid up; and that the foreclosure and sale of the property was by said Patterson in the name of this plaintiff, and for his benefit, etc.

The eighth paragraph is similar, with some additional averments in relation to the foreclosure suit and the sale of the property under the foreclosure decree, averring that by the same said judgment was fully paid and entered satisfied.

We think these two paragraphs of McMahan's answer were good defences to plaintiff's cause of action to compel McMahan to redeem, or to foreclose the mortgage against him. Taking the allegations of the paragraphs to be true, he purchased and paid for his lot before Perrin purchased. Patterson was then the owner and holder of the mortgage, and as such, with a knowledge of McMahan's rights, released property from the mortgage that was liable to sale before McMahan's, of a value more than the whole mortgage debt, in addition to the twenty-three lots that had not been sold by Schuler, which were first liable to sale on a foreclosure of the mortgage. These facts would certainly release appellee McMahan's lot from liability under the mortgage, and if his lot was released, he could not be required to redeem, nor could the mortgage be foreclosed against him. There was no error in overruling the demurrer to the seventh and eighth paragraphs of appellee McMahan's answer.

The reasons stated for a new trial are, the finding of the court is not sustained by the evidence, and is contrary to law.

We have examined the evidence, which is too voluminous to copy in this opinion, and think there is testimony tending to support the finding of the court. In such cases this court will not reverse the judgment upon the evidence, and we do not see wherein the finding is contrary to law. There is no available error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

HOWK, C. J., took no part in the decision of this cause.

Filed March 29, 1884.

No. 11,022.

MANSUR ET AL. *v.* HINKSON.

94 395
126 312
94 395
141 404

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168 129
168 130
168 135

HUSBAND AND WIFE.—*Judicial Sale of Real Estate.—Wife's Inchoate Interest.—Descents.—Widow's Third.—Statute Construed.*—Under execution issued upon a simple personal judgment, certain of the debtor's real estate was sold by the sheriff to the creditor, and the land not having been redeemed, he obtained a sheriff's deed therefor. Such creditor having died, his heirs brought an action of partition against the debtor's wife. The evidence showed that the two-thirds of the land sold was worth much more than the amount of the debt for which it was sold, and that the debtor's other property and that sold were worth more than $10,000, and less than $20,000.

Held, under section 2508, R. S. 1881, that the wife is entitled to one-third, notwithstanding the proviso in section 2483, R. S. 1881.

From the Superior Court of Marion County.

H. J. Milligan, for appellants.

J. P. Baker, for appellee.

BICKNELL, C. C.—This was a suit for partition by the appellants against the appellee. It was tried by the court at

special term, and, at request of the parties, the facts were found specially, and conclusions of law were stated thereon, first, that the plaintiffs are entitled to two-thirds of the land in controversy; second, that the defendant is entitled to one-third of said land. The plaintiffs excepted to the conclusions of law. There were other conclusions of law, but as they depend upon those above stated they need not be specially considered. Partition was made pursuant to the conclusions of law aforesaid, and judgment was rendered accordingly. The plaintiffs appealed to the superior court in general term, and assigned as errors there that the court in special term erred in its conclusions of law.

The court in general term affirmed the judgment of the court in special term. From the judgment of the court in general term the plaintiffs appealed to this court. Here the error assigned is that the court below, in general term, erred in affirming the judgment of the court in special term.

The special finding was, in substance, as follows:

That on January 21st, 1879, Hezekiah Hinkson owned two lots of land in Indianapolis. These may be here designated as lots No. 2 and No. 20. That on the day last mentioned Isaiah Mansur obtained a judgment against the said Hezekiah Hinkson for $429.09, without relief; that under an execution on said judgment said two lots were sold to said Isaiah Mansur, who shortly afterwards died, leaving the plaintiffs his heirs at law; that said lots were not redeemed, and the sheriff, on December 23d, 1881, conveyed the same to the plaintiffs as such heirs; that at the date of the said sale, and long before, the defendant was the wife of said judgment debtor; that she is now his wife, and that her interest was not sold, nor ordered to be sold, under said judgment; that when sold said lot No. 2 was worth $1,700, and said lot No. 20 was worth $700; that at the time of said sale said Hezekiah Hinkson owned other real estate, in Marion county, Indiana, worth $17,520, and that the aggregate value of his real estate, including said two lots, was $19,720.

The appellants claim that, upon these facts, the proper conclusions of law are that the plaintiffs are entitled to three-fourths of said two lots, and the defendant to the remaining one-fourth only.

The solution of the question here presented depends upon the construction proper to be given to the 17th section of the statute of descents, R. S. 1881, section 2483, and the first section of the act of 1875, Acts 1875, p. 178, R. S. 1881, section 2508.

These sections are as follows:

Section 2483. "If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors: *Provided, however,* That where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only, as against creditors."

Section 2508. "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise. When such inchoate right shall become vested under the provisions of this act, such wife shall have the right to the immediate possession thereof; and may have partition," etc.

The other provisions referred to in the last foregoing section do not affect the question now under consideration.

It will be observed that there was no finding that any of Hezekiah Hinkson's property was subject to other incum-

brances. And there was no finding that he had any other creditor than his judgment creditor, Isaiah Mansur. Therefore, this case is to be determined as if there were no such incumbrances and no such other creditors. And it may be observed that, if the wife in this case takes one-third of the land in controversy, the plaintiffs are fully protected, because the value of the land assigned to them as two-thirds is nearly three times the amount of their ancestor's debt, and the statutes under consideration being *in pari materia*, both of them making provision for the wife, they must be construed together. Section 17, *supra*, has been construed by this court as follows:

1. The widow takes as heir. *Fletcher* v. *Holmes*, 32 Ind. 497.

2. The widow takes one-third in fee as against heirs. *Johnson* v. *Johnson*, 9 Ind. 28.

3. Dower having been always favored in law, having been regarded as a legal, equitable and moral right, and next to life and liberty sacred, *Kennedy* v. *Nedrow*, 1 Dallas, 415, and section 17, *supra*, being a substitute for dower, it must be regarded with the same favor and liberality formerly shown to dower. *Noel* v. *Ewing*, 9 Ind. 37; *Perry* v. *Borton*, 25 Ind. 274.

And it follows that the same liberal construction in favor of the wife should be applied to the act of 1875, *supra*, which makes a beneficial provision for the wife, by authorizing her inchoate interest to become vested upon a new contingency, to wit, the judicial sale of her husband's lands. Such liberal construction the act of 1875 has already received.

In *Taylor* v. *Stockwell*, 66 Ind. 505, it was held that by the law of 1875, two-thirds only of the debtor's land can be sold on execution, and that the inchoate right of the wife becomes vested as to one-third of the land upon the judicial sale of the other two-thirds.

In *Lawson* v. *DeBolt*, 78 Ind. 563, it was held that the sale of a debtor's real estate, under the act of March 5th, 1859, providing for voluntary assignments, is a judicial sale within

the meaning of the act aforesaid of 1875, and it is said by the court: "It is very evident that the Legislature never meant that the wife's rights should be made to depend upon fine-spun distinctions, or close technical definitions." And, again: "A broad and liberal construction of the language used by the Legislature" is required.

In *Ketchum* v. *Schicketanz*, 73 Ind. 137, it was held that the inchoate right of the wife becomes vested upon the conveyance of her husband's real estate to his assignee in bankruptcy.

In *Leary* v. *Shaffer*, 79 Ind. 567, it was held that where the wife of a bankrupt, whose inchoate right to one-third of the bankrupt's land had become absolute under the act aforesaid of 1875, had joined her husband in mortgaging the land, she was entitled, upon a foreclosure of the mortgage, to a decree that the other two-thirds be first sold, it appearing that such two-thirds was of a value sufficient to satisfy the mortgage.

In *Elliott* v. *Cale*, 80 Ind. 285, and *Riley* v. *Davis*, 83 Ind. 1, it was held that on a judicial sale of the husband's land the inchoate interest of his wife becomes vested and absolute on the day of sale.

In *Keck* v. *Noble*, 86 Ind. 1, it was held that the act of 1875, *supra*, applies to equitable as well as to legal estates of the husband.

These cases show that the construction of the act of 1875 by this court has always been liberal, and has sought to protect the substantial interests of the wife, in accordance with the intention of the Legislature.

Section 17, *supra*, does not declare that one-fourth of the husband's lands shall descend to her in fee simple; such a provision would have presented a difficult question. Two-thirds of the real estate descend to the heirs; if one-fourth should descend to the widow, the question is what would become of the remaining one-twelfth; it ought to descend somewhere; the old doctrine of abeyance ought not to be revived.

If the statute had declared that one-fourth only should de-

scend to the widow, the heirs would take by descent eight-twelfths of the land, the widow would take three-twelfths, and the remaining one-twelfth would be without an owner; it could not descend to the creditors; if liable to them at all, it must be liable as the land of somebody, subject to their claims. The Legislature has not brought us into any such difficulty. The provision of section 17 is that one-third of the real estate shall descend to the wife free from all demands of creditors: *Provided, however,* That when the real estate shall exceed in value $10,000, and shall not exceed in value $20,000, "the widow *shall have* one-fourth only as against creditors."

If there is any obscurity in the words "shall have," they ought to be construed favorably for the widow.

The only difference between heirs and widow, in estates of the value of $10,000 or less, is, that the former inherit two-thirds and hold the same subject to the claims of their ancestor's creditors; the latter inherits one-third and holds it free from all claims of her deceased husband's creditors. Where the value of the estate exceeds $10,000, and does not exceed $20,000, the heirs still inherit two-thirds, subject to claims of creditors, and it seems to us that, under section 17, *supra,* the widow still inherits one-third in fee as against the heirs, but as against creditors she holds it subject to their demands as to a part of it, provided that part be necessary to satisfy such demands.

For example, the heirs take eight-twelfths by descent, subject to creditors' claims; the widow takes four-twelfths by descent, and holds it free from all claims of creditors, except that, if the estate exceeds in value $10,000 and does not exceed in value $20,000, she holds three-twelfths absolutely free from all demands of creditors, but she has one-twelfth which may be subjected to the demands of her husband's creditors if his other property is not sufficient to pay them. Under this construction a widow will always "have one-fourth only," where any part of her third is needed to pay the creditors of such a large estate; but where the other prop-

erty of the deceased is sufficient to pay his debts, then the widow's one-third, taken by descent, will be unimpaired. Her one-third may be reduced to one-fourth, in case of such a large estate, whenever the other property of her deceased husband is insufficient to pay his debts; then one-fourth of her one-third, that is, one-twelfth of the entire real estate, may be subjected by the creditors.

It is true that this construction may require the creditors to take proceedings in court against a widow to subject one-fourth of her one-third to the payment of their demands in the proper cases. This is not a valid objection. Creditors often have to proceed against heirs, and if they claim that the other property of the deceased is not sufficient to pay them, and that therefore one-fourth of the widow's third of such large estate ought to be subjected to their claims, so as to reduce her holding to one-fourth of the entire estate, it is no hardship upon them to be obliged to prove such matters in court. But, as this court said, in *Noel* v. *Ewing, supra,* "We have nothing to do with collateral questions and fancied consequences not legitimately in the record. It is not worth while to anticipate issues. The court will thus be able to meet, untrammelled, every question as it arises."

The question is, what was the intention of the Legislature in section 17 of the statute of descents? Undoubtedly, the intention was to make a better provision for the wife than she had before. This they did by declaring that one-third of the land should descend to her in fee free from all demands of creditors, but as one-third for the widow would seem to be too much in cases of large estates where the husband died insolvent, they seem to have added the proviso for the benefit of creditors in such cases, which proviso is, substantially, that, although one-third must descend to the widow in fee, and be held by her, in general, free from all demands of creditors, yet where the land exceeds in value $10,000, and does not exceed $20,000, she shall not have the entire one-third free from

the demands of creditors, but shall hold it subject to their claims to the extent of one-fourth thereof, thus reducing the widow's share to one-fourth instead of one-third, and reducing it to one-fifth instead of one-third where the land exceeds $20,000 in value. We think the intention was that the widow, in case it should be necessary for the payment of creditors, should hold one-fourth of her third subject to their claims, in one class of cases, and should hold two-fifths of her third subject to such claims, in another class of cases, but that her inheritance should not be liable at all to creditors of her deceased husband unless his other property would not pay them.

Upon this construction of the statutes, a wife or widow will have one-third as against everybody, except that, if the value of the real estate exceeds $10,000, and does not exceed $20,000, she will hold one-fourth of it only as against creditors whenever the other property of the husband is insufficient to pay them, but if such other property is sufficient to pay the creditors, then her one-third can not be reduced to one-fourth.

We think this construction accords with the intention of the Legislature by preserving to the wife or widow her one-third of the husband's real estate, except in cases where some of it is required to pay creditors of estates exceeding in value $10,000, and not exceeding in value $20,000. We think the interest of the wife or widow is not required to be reduced to one-fourth in any case, unless the other property of the deceased is insufficient to pay his debts.

The appellants, in their brief, state that "the wife takes solely by the statute," and that "it is impossible to see how she is to take an interest greater than the statute gives her." But, as already stated, the statute does not say that the wife shall take one-fourth by descent; it does say that she shall take one-third by descent, and that in certain cases she shall "have," as against creditors, only one-fourth. We are satisfied that the construction we have given not only avoids serious difficulty, but places the proviso and the body of section 17 in harmony, by securing to the wife or widow one-third

absolutely, in estates of less value than $10,000, and reducing her inheritance to one-fourth or one-fifth in the large estates, in the proper cases, where the remaining property of the husband is not sufficient to pay his debts.

In this case the debt was about $500; the land assigned in partition to the plaintiffs was of the value of $1,500; the other real estate of the husband was worth upwards of $17,000. Therefore, no part of the widow's one-third was required to pay the only creditor, and although the real estate was of greater value than $10,000, and did not exceed in value $20,000, it was not a case where, under the proper construction of the two sections hereinbefore mentioned, the widow's one-third ought to be reduced to one-fourth.

The conclusions of the superior court in special term were not erroneous; the said court in general term committed no error in affirming the judgment of the court in special term.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed March 29, 1884.

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94 403
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94 403
142 161

No. 10,707.

CUMMINGS ET AL. v. PLUMMER ET AL.

WILL.—*Construction of.*—"*Children.*"—*Grandchildren.*—A testator, by his will, directed his executor to convert his estate into money, and to then "make distribution between my *children* living, and the *children* of my deceased *children if* living at the time," etc. At the testator's death he left living children, but one of his children had died leaving some living children, and also some who had already died leaving children who were great grandchildren of the testator.

Held, that the latter took nothing.

From the Union Circuit Court.

— *Brown* and — *Brown*, for appellants.

T. D. Evans, for appellees.

COLERICK, C.—The appellants filed their complaint against the appellees to obtain a construction by the court of certain provisions in the will of Henry Peinson, deceased. A demurrer to the complaint, assigning insufficiency of facts, was sustained, and, the appellants declining to amend, final judgment, on demurrer, was rendered against them, from which they appeal. The only error assigned is the ruling of the court upon said demurrer.

The provisions of the will to be construed are embraced in the second item or article thereof, as follows:

"Article 2d. I direct my executor to sell my homestead farm on which I now reside, in Harrison township, Union county, Indiana, consisting of two hundred and ten acres, also my farm in Center township, county above written, on which my son Isaac now resides, to best advantage as he may consider, and when my estate is changed into money I desire my executor to make distribution between my children living, and the children of my deceased children if living at the time, and share alike, to wit: The children of Sophia A. Plummer, deceased, to receive the portion that she would have received if living; the children of Thomas Peinson, deceased, to receive the portion that he would have received if living; the children of Mary J. Kettler, deceased, to receive the portion that she would have received if living; the chileren of Lydia A. Hall, deceased, to receive the portion that she would have received if living. I desire my entire estate to be distributed as above described, except $100 I direct my executor to pay the trustees of the Christian church at Hannen's Creek, in Harrison township, Union county, Indiana, the interest only to be used by said trustees for the benefit of said church; also, $100 I desire my executor to pay to my granddaughter Mary Wescott over and above her portion as the heir of her mother."

The complaint, in substance, avers that the appellants were, at the time of the making of said will and the death of said testator, and still were, the living grandchildren of said So-

phia A. Plummer, they being the children of two of her children who were deceased at the time of the making of said will; that said Thomas Peinson, Mary Heltner and Lydia A. Hall, at the making of said will, had no grandchildren living, and that the appellants were the only grandchildren of any of the deceased children named in said will; that by the following clause in said will, to wit, "I give and bequeath to the children of Sophia A. Plummer, deceased, the portion that she would have received if living," the appellants were included and became entitled to their portion of the legacy so bequeathed to the living children of said Sophia A. Plummer; that the word "children," as used in said will, meant and included grandchildren in the sense in which said phrase was used in said will, as would more fully appear by the whole will, a copy of which was filed with and made a part of the complaint; that Mary Wescott, named in said will, was the child of said Lydia A. Hall, who was the daughter of the testator; that the appellees Thomas Plummer and Henry Plummer were the only children of said Sophia J. Plummer living at the time of the making of said will, and that they were still living; that said will had been duly probated, and that the legacy belonging to the appellants and the appellees Thomas Plummer and Henry Plummer, amounting to about $2,400, was then in the hands of the appellee Richard M. Haworth, as the executor of said will, for distribution, and that the appellants and the appellees Thomas Plummer and Henry Plummer constituted all the legatees of said Sophia A. Plummer; that said executor disputed the right of the appellants to any legacy under the will. Wherefore they prayed that they be adjudged legatees under the will, and entitled to their portion of said legacy, and that said executor be directed to pay the same, and for other relief.

The only question submitted for our consideration is, whether the appellants, as the grandchildren of Sophia A. Plummer, are entitled to participate, as legatees, in the dis-

tributive share of said estate, which, by the provisions of the will, was given to "the *children* of Sophia A. Plummer, deceased." There is no expression used in the provision of the will to which we have referred, or in any other provision, indicating, in any manner, that the word "children" was intended to be used by the testator in any other than its proper and ordinary signification, or evincing an intention or desire on his part to make any provision whatever for the appellants, but, on the contrary, the language used in the will clearly indicated an intention or desire on his part to exclude them from participating in the distribution of his estate, as the will directs the executor of the will, after he has converted the real estate into money, to make distribution thereof among the testator's children, living, "and the *children* of his [my] children *if living at the time.*" By this provision it is apparent that the appellant intended to confine the distribution of his estate, as to the children of his deceased children, to those of them who might be living at the time of the making of the distribution. And as it appears by the averments in the complaint that, at the time of the death of the testator, there were, and still are, children of Mrs. Plummer living, we think that they alone, as such children, are entitled to the share in the estate which Mrs. Plummer would have received if living.

In 2 Jarman on Wills, p. 690, it is said: "The legal construction of the word *children* accords with its popular signification; namely, as designating the immediate offspring; for, in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue. It has sometimes been asserted, however, that a gift to children extends to grandchildren, where there is no child." And in 2 Redfield on the Law of Wills (2d ed.), p. 15, it is said: "The word 'children,' as well as all other similar descriptive terms of classes or relations, it will be borne in mind, must always be understood in wills, in its primary and simple signification, where that can be done; in short, where there are any persons in existence at the date of the will, or

before the devise or legacy takes effect, answering the meaning of the term. And where the term 'children' has received a larger and more extended construction, as synonymous with issue, it has generally been based upon something in the will, unless it resulted as already intimated, from the fact that there were no children in existence."

The law, as above stated in the text-books to which we have referred, is recognized and fully sustained by an unbroken line of decisions. Among the cases directly in point are the following: *Churchill* v. *Churchill*, 2 Met. (Ky.) 466; *Collins* v. *Hoxie*, 9 Paige, 81; *Cromer* v. *Pinckney*, 3 Barb. Ch. 466; *Gardner* v. *Heyer*, 2 Paige, 11; *Mowatt* v. *Carow*, 7 Paige, 328; *Appeal of Gable*, 40 Pa. St. 231; *Ward* v. *Sutton*, 5 Ired. Eq. 421; *Hallowell* v. *Phipps*, 2 Whart. 376; *Dickinson* v. *Lee*, 4 Watts, 82; *Cutter* v. *Doughty*, 23 Wend. 513; *Izard* v. *Izard*, 2 Des. Eq. (S. C.) 308; *Phillips* v. *Beall*, 9 Dana (Ky.), 1; *Ewing* v. *Handley*, 4 Littell, 346; *Osgood* v. *Lovering*, 33 Maine, 464; *Thomson* v. *Ludington*, 104 Mass. 193; *Low* v. *Harmony*, 72 N. Y. 408; *Castner's Appeal*, 88 Pa. St. 478; *Feit* v. *Vanatta*, 21 N. J. Eq. 84.

In *Churchill* v. *Churchill*, *supra*, the law is thus clearly and forcibly stated: "The technical legal import of the word 'children' accords with its ordinary and popular signification. It does not denote grandchildren; and, though sometimes used with that purpose and effect, there is no warrant for thus enlarging its meaning in construing a will, unless indispensably necessary to effectuate the obvious intent of the testator. It may be regarded as well settled that such enlarged or extended import of the word 'children,' when used as descriptive of persons to take under a will, is only permissible in two cases. *First*, from necessity, where the will would be otherwise inoperative; and, *second*, where the testator has shown by other words that he did not use the word in its ordinary and proper meaning, but in a more extended sense." The other cases cited are to the same effect.

No error was committed in sustaining the demurrer to the complaint.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellants.

Filed April 2, 1884.

No. 8118.

BOOTS ET AL. v. CANINE.

94 408
124 514
94 408
133 156
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143 71
94 408
144 638
94 408
148 274
94 408
162 494
162 542

ARBITRATION.—*Agreement to Submit.*—In a statutory arbitration the agreement to submit must be in writing.

SAME.—*Common Law Bond.*—A bond simply to secure performance of an award, and referring to, but not containing, an agreement to submit, does not supply the place of the written agreement required in a statutory arbitration.

SAME.—*Evidence.*—The fact that there was an agreement to submit can be proved only by proving the agreement itself, whether oral or written.

SAME.—*Immaterial Recital in Award.*—A recital in an award that the agreement to submit was in writing will not prevent proof that such submission was oral.

SAME.—*Pleading Withdrawn may be Used as Evidence.—Admission.*—In an action upon an arbitration bond, trial was had, a judgment rendered, and an appeal taken to the Supreme Court, upon issues formed by an answer containing a paragraph admitting that the agreement to submit was merely oral, as alleged by the plaintiff. Upon a second trial such answer was superseded by one not containing any such admission, but the plaintiff was permitted to put in evidence the former answer containing such admission.

Held, that the evidence was competent, but not conclusive, as an admission.

From the Montgomery Circuit Court.

E. C. Snyder, *P. S. Kennedy* and *W. T. Brush*, for appellants.

J. M. Thompson, *W. H. Thompson*, *J. E. McDonald*, *J. M. Butler* and *A. L. Mason*, for appellee.

ELLIOTT, J.—This case is here for the second time. When it was in this court the first time, it was decided that the award sued on was a common law and not a statutory award, and that the complaint as it then stood was good. *Boots* v. *Ca-*

nine, 58 Ind. 450. These questions are conclusively settled. Where an appellate court pronounces judgment upon questions directly before it, and necessarily involved in the case, that judgment controls the case, upon the points directly decided, throughout all its subsequent steps.

Appellants claim that the answer filed since the case was sent back to the trial court shows that the award is a statutory one. It is alleged in this answer that two bonds were executed; that they contained a provision for submitting the matters in dispute to arbitration, and that the award should be made an order of court.

We do not think the bonds can be regarded as occupying the place of a written agreement to submit the matters to arbitration and to cause the award to be reported to a court. The bonds merely bind the parties to abide the award. They are nothing more than the usual bonds executed to secure performance of the award in common law arbitrations. Bonds executed for that purpose can not be deemed the written agreement of submission so as to constitute the arbitration a statutory one. The bonds under immediate mention refer to an agreement, and do not of themselves purport to be that agreement, but are, as their terms plainly import, merely collateral. A distinctive feature of a statutory arbitration is that the submission shall be in writing. *Boots* v. *Canine*, *supra*. A bond to secure performance of the award is not the written agreement contemplated by the statute. We do not mean to say that such an agreement may not be incorporated in the bond, but we do mean to say that where the bond expressly refers to an agreement of submission and contains nothing more than the provisions ordinarily found in bonds executed in common law arbitrations, it can not be deemed a written agreement of submission within the meaning of the statute.

The award states that the agreement to submit was in writing, and the appellants argue that parol evidence was not competent to show that it was an oral one. We do not regard

the recital in the award as being either within the spirit or the letter of the rule prohibiting the introduction of parol evidence to vary or alter a written instrument. A recital of this character is not the statement of any material part of the award, and, in strictness, forms no part of it when considered as an instrument of evidence. A text-writer, speaking of a decision upon this subject, says: "The court, in the cited case, said, generally, that the award can be evidence only of those matters in respect of which the parties or the court, from whom it derives its validity and effect, have made it evidence." Morse Arb. & Award, 529. On principle this must be so. The parties do not authorize the arbitrators to supply evidence of their agreement to submit. The oral agreement, or the written contract, is the evidence of the submission, not the statements of the award. In *Still* v. *Halford*, 4 Campb. 17, it was held that a recital in an award that the two arbitrators had appointed a third to act with them was no evidence of such appointment. In speaking of an agreement to submit, an English writer says: "As it is a contract deriving its force from the consent of the parties, and not from the rule, it ought to be proved like any other contract." Russell Awards (4th ed.), 529. No error was committed in permitting appellee to prove the agreement to submit to arbitration.

The trial court did not err in permitting appellee to read in evidence answers filed by the appellants, although they were subsequently superseded by amendment or withdrawn. The question is presented in a peculiar form, and, as presented, we are clear that this ruling should not be allowed to reverse the judgment. The record shows that there had been issues formed and a trial had; that the appellants successfully relied upon their answers, and the case came to this court, and the judgment was reversed, but not upon the answers; and that after this reversal the original answers were superseded by amendment. The record thus recites the proceeding on the trial: "The plaintiff then offered in evidence the original complaint and answers for the purpose of proving by one of

the paragraphs of the answer that the defendants had admitted that the agreement to submit to arbitration was verbal, and not in writing, to the introduction of which evidence the defendants objected, on the grounds that the statements of a party made in his pleadings, where they are not sworn to, are not admissible against him." It will be observed that the answers had stood through one trial and through an appeal as statements of the appellants' defence, and that they had placed these pleadings before the trial and appellate courts as true statements of the facts of their case. We can perceive no reason why the answers did not, under these circumstances, constitute some evidence of the facts stated in them.

It is quite firmly settled that the question is not as to the weight of evidence, but as to its competency and relevancy. In *Harbor* v. *Morgan*, 4 Ind. 158, it was decided: "When evidence is pertinent to the issue, it should be admitted, however little it may seemingly tend to prove." This doctrine is approved in *Hall* v. *Henline*, 9 Ind. 256, and *Nave* v. *Flack*, 90 Ind. 205. The question is, then, not what the weight of the evidence is, but whether it was competent, for, if competent, there was no error in admitting it, however little it may have tended to prove.

It is not doubted that admissions in pleadings are not conclusive when used merely as evidence and not as part of the proceedings in the cause. On the contrary, they are, when so used, fully open to contradiction or explanation. We shall presently speak of cases where these admissions assume a conclusive character. Just now we are speaking of their admissibility as evidence. We think the rule is correctly stated by Mr. Wharton, who says: "It is proper to add at this place that the pleadings of a party in one suit may be used as evidence against him in another, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts." 1 Whart. Ev., section 838. This is what we rule here, the answer, having been affirmed to be true for several years, and acted upon through one trial and one appeal,

should be deemed evidence of admissions, but evidence open to explanation.

It is well known that the common law recognized fictions in pleading, and did not, in any way, require pleadings to state the truth, but even under that system the decided weight of authority was that the pleadings of a party were admissible against him. *Bliss* v. *Nichols*, 12 Allen, 443; *Currier* v. *Silloway*, 1 Allen, 19; *Gordon* v. *Parmelee*, 2 Allen, 212; *Hammatt* v. *Russ*, 16 Maine, 171; *Tabb* v. *Cabell*, 17 Grat. 160.

But it is not necessary to refer to common law authorities, for our statute has adopted the equity practice. We treat pleadings as statutory fact not fictions. All the cases upon this subject agree upon this point. We are therefore to look to chancery rather than common law rules. *Scott* v. *Crawford*, 12 Ind. 410; Pom. Rem., sections 507, 508, 517. Commencing with the early authorities, we shall find an unbroken line arrayed in favor of the doctrine that pleadings in chancery are always admissible in evidence. It is said by an author whose book has long occupied a high place, that "The bill in chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed true; nor shall it be supposed to be preferred by a counsel, or solicitor without the party's privity, and therefore it amounts to the confession and admission of the truth of any fact." Buller *Nisi Prius*, 235. The ground given by this author for his conclusion applies to all pleadings, and more strongly to code pleadings than others, for, under the code, pleadings are required to state facts. It surely would be a violation of all rules to treat a pleading as a mere meaningless collection of words, or else as a mere collection of fictions. It is to be observed that the reason why bills in chancery are evidence is, not because they are sworn to, but because they are presumed to state facts. This is clear from what appears in our quotation as well as from the known rule that bills were not always required to be verified. But all doubt is removed by what this author says at another place, for we there find it written: "If the

bill be evidence against the complainant, much more is the answer against the defendant; because this is delivered in upon oath." Buller *Nisi Prius*, 237. The theory of all the authorities upon this subject is that chancery pleadings are admissible in evidence because they are presumed to truly state the facts. Gresley Eq. Ev. 13; *Hart* v. *TenEyck*, 2 Johns. Ch. 62.

If it can be said that courts can presume that an answer under our code does not state facts, then it may be logically said that it is not evidence, but if the presumption is, that it does state facts, then it is logically inconceivable that it should not be evidence against the party. But we need not go outside of our own State for authorities. In *McNutt* v. *Dare*, 8 Blackf. 35, it was said: "There is another reason why the plaintiffs could not object to the evidence. It was a part of their own answer to the bill of discovery; and the answer of a party is legal evidence against him." In *Clark* v. *Spears*, 7 Blackf. 96, it was said by BLACKFORD, J., in speaking of a defendant's answer, that "The admission in such a case is evidence against the defendant." As sustaining the doctrine that chancery pleadings are admissible in evidence we cite, *Kiddie* v. *Debrutz*, 1 Hayw. 420; *Mims* v. *Mims*, 3 J. J. Marsh. 103; *Roberts* v. *Tennell*, 3 Mon. 247; *Hunter* v. *Jones*, 6 Rand. 541. In the recent case of *Brown* v. *Jewett*, 120 Mass. 215, it was held that a bill in chancery signed by another party was evidence against the defendant if it appeared that he "authorized the bringing of the bill for the purpose set forth in the bill." It seems clear that as we have substantially adopted the chancery practice, pleadings must be presumed to be true, and, therefore, to constitute evidence, and this, without further discussion, should settle the case.

When we turn to the provisions of the code, and to the decisions of the courts where the code practice prevails, we shall find that there are still stronger reasons for holding that pleadings are admissible in evidence. Our code imperatively re-

quires that pleadings shall state facts, but it does not stop with this command. It provides that "All fictions in pleading are abolished." R. S. 1881, section 378. It is several times declared that pleadings not sworn to shall have the same effect as pleadings sworn to. It is simply absurd to say that under our code the statements in the pleadings are mere fictions, and if they are not fictions then they are facts, and if facts in some cases, and in others conclusive admissions of record, then they are evidence. An admission in a pleading is the admission of matters of fact; this seems so plain that it is difficult to understand how the contrary doctrine can be seriously asserted. One among the earliest cases on the subject declares that "The spirit of the code is, that the parties shall place upon the record, in the form of averments, the real facts of the case, eschewing all fictions and repetitions." *Shinloub* v. *Ammerman*, 7 Ind. 347. This is the holding of all our cases; there is not a break in the long line. An answer in confession and avoidance is an admission of facts, and we suppose no lawyer will assert that admissions are not evidence. Either an affirmative answer is this or it is nothing, a mere figment.

The courts of the States where the code practice prevails are unanimous on the right to introduce admissions contained in pleadings in evidence, with the possible exception of California, where there seems to be a direct conflict. It was held in *Broadrup* v. *Woodman*, 27 Ohio St. 553, that a party's answer is admissible in evidence. The Supreme Court of Kansas, in *Hobson* v. *Ogden*, 16 Kan. 388, speaking of an answer, used this language: "Of course, as admissions of one of the defendants, they were good as against him." To the same effect is the decision in *Solomon R. R Co.* v. *Jones*, 30 Kan. 601. In *Ayres* v. *Hartford F. Ins. Co.*, 17 Iowa, 176, it was held, Judge DILLON delivering the opinion, that an answer was competent evidence. In *Meade* v. *Black*, 22 Wis. 241, the court held the same doctrine. The same holding is made in *Cook* v. *Barr*, 44 N. Y. 156, where it was said: "When a

party to a civil action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to give them in evidence; and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made. Admissions do not furnish conclusive evidence of the facts admitted, unless they were made under such circumstances as to constitute an estoppel, or were made in the pleadings in an action, when they are conclusive in that action. They may be contained in a letter addressed to the opposite party, or to a third person, and in either case are entitled to equal weight and credit. They are received in evidence, because of the great probability that a party would not admit or state anything against himself or his own interest unless it were true. And I am unable to see why the rule does not apply to admissions contained in the pleadings in an action under our system of practice, which requires the facts to be alleged truly in the pleadings." In *Fogg* v. *Edwards*, 27 Hun, 90, it was held that a party has a right to introduce in evidence an answer, although it has been withdrawn. The court, in *Strong* v. *Dwight*, 11 Abbott Pr. N. S. 319, granted leave to supersede answers by amendment, but held that the defendant should leave the original on file, so that, to use the language of the court, "the plaintiff can use the existing original answer as evidence on the trial, to prove the defendant's admission." These authorities are conclusively in favor of the ruling of the court below, and in opposition to them are cited the cases from California and one from New Hampshire. The former cases, as we have said, are directly in conflict with another decision of the same court, and no authortiy is cited in their support, and the reasoning is far from satisfactory. The New Hampshire case of *Kimball* v. *Bellows*, 13 N. H. 58, is not applicable to pleadings under the code system, but if it were it could not be followed, because it is in conflict with the great weight of authority as to the admissibility of common law pleadings; it

is, indeed, in direct conflict with a decision of the same court, that of *Cilley* v. *Jenness*, 2 N. H. 87.

Admissions in pleadings are sometimes conclusive, but they are not so in a case like the present. One class of cases where the admissions are conclusive is that in which judgment has been pronounced upon the issues joined. Another class is that in which the pleadings, without diversity of statement, make distinct admissions and are left standing. As an example of the latter class may be given that of a defendant pleading payment only to a complaint on a promissory note. In such a case he can not dispute the execution of the note. In the present case the admissions, like ordinary verbal or written admissions, are fully open to explanation, but they are nevertheless admissions, and as such are competent evidence. Like other admissions, all the statements of the whole pleading are to be taken together, what makes for the pleader as well as what makes against him. Where the paragraphs of an answer are contradictory one does not necessarily destroy the other, nor does one necessarily control the entire pleading. It may often happen that because of the circumstances under which the pleading is filed, or because of the nature of the contradictory paragraphs, the admissions will be of such little value as to make them immaterial, and in such a case there would be no available error in excluding them, nor would there be error in admitting them. But in the present case we do not think that the admissions made in a pleading which had so long been adhered to and acted upon by the party can be deemed immaterial.

We should feel that we were doing an idle thing if we should undertake to cite authority upon the proposition that a party can not be deprived of his right to give in evidence an admission, because the latter had withdrawn it. Even in criminal cases, an admission made by the accused before the examining magistrate is not rendered incompetent by a subsequent withdrawal. The withdrawal of an admission may,

in proper cases, go in explanation, but it can not change the rule as to its competency. We have never, until the argument in this case, known it to be asserted that the withdrawal of a confession or an admission destroyed its competency as evidence against the person making it. If it did, then criminals might destroy evidence by retraction, and parties escape admissions by a like course. The law tolerates no such illogical procedure. It is proper to show the withdrawal and all attendant circumstances, for the purpose of determining the weight to be attached to the admission, but not for the purpose of destroying its competency.

The cases of *Colter* v. *Galloway*, 68 Ind. 219, and *New Albany, etc., P. R. Co.* v. *Stallcup*, 62 Ind. 345, are in line with what we here decide, and are well sustained. In the former case it was said, in speaking of pleadings left standing: "The pleadings in the cause are before the court, and constitute a part of its proceedings, without being introduced in evidence. The averments contained in, and admissions, if any, made by, such pleadings, may be commented upon before the jury in the same manner as any other facts appearing in the cause." This is the law where pleadings are not withdrawn, and where there are no contradictory pleas. When withdrawn they are no longer pleadings in the case, but may become evidence. It has been over and over again decided that when pleadings are superseded by amendment they must be brought again before the court by some appropriate method, and in such a case as this that method is by offering them in evidence. In *Paige* v. *Willet*, 38 N. Y. 28, the court said: "While the answer stood upon the record, the defendant was not at liberty to raise an issue which he had emphatically closed. * * * Such admissions are conclusive upon the parties litigant, and upon the court, and no countervailing evidence can properly be received." *White* v. *Smith*, 46 N. Y. 418. If it be true, as it undeniably is, that an admission in a pleading operates against a party, then it must also be true that he can not, by

any act of his own, destroy its competency. To hold otherwise would be to declare that a party may, by a retraction, deprive his adversary of admissions previously made, and surely no one will seriously contend that this can be the law. In the well considered case of *Mott* v. *Consumers' Ice Co.*, 73 N. Y. 543, the original answers were superseded by amendment, and both court and counsel, although the case was well contested and ably argued, treated the right to admit the original answers as beyond dispute, and debated only the question whether they were or were not conclusive, the court holding, as we hold, that they were admissible, but not conclusive.

In the last brief of appellants' counsel it is virtually conceded that the superseded answers would be admissible in a different case, but not in the same case in which they were originally filed. Many of the cases we have cited expose the fallacy of this argument, but it is so apparent that it does not require authority to overthrow it. An admission is an admission, however made, and is just as competent in one case as in another. The competency of an admission does not depend upon the case in which it is offered. If it was voluntarily made and is relevant to the issue, it is admissible against the party making it, although made in the progress of the same cause. If the position of counsel were correct, then the plaintiff, to get the benefit of the admission in the pleading, must dismiss the pending case and commence another, and surely there is neither reason nor law for such a course.

We rule that under the circumstances of this case there was no available error in admitting the answers in evidence, and this is all the record requires us to decide, and it is all we do decide upon this point. Judgment affirmed.

Filed April 3, 1884.

No. 10,927.

CORBIN ET AL. *v.* GODDARD.

GARNISHMENT.—*Practice.—Pleading.—Demurrer.—Evidence.*—A garnishee, upon appearing, may test the affidavit and order against him by demurrer or motion, but need file no answer, as the action should then proceed by the oral examination and testimony of parties and witnesses.

SAME.—*Trial as at Law.—Motion in Arrest.—Affidavit.*—Where the parties go through a regular trial, as at law, and the affidavit is tested only by a motion in arrest, the Supreme Court may examine the proceedings as though they were regular.

SAME.—*Fraudulent Transfer.—Promissory Note.*—Where such affidavit charges that the attachment defendant, at the time of his alleged fraudulent transfer of a promissory note to the garnishee, was notoriously insolvent, and that all his property, subject to execution, had been sold on execution, it is sufficient to withstand a motion in arrest.

SAME.—*Special Finding.—Fraud a Conclusion and not a Fact.*—In making a special finding of facts where such fraudulent transfer is alleged, it is not necessary that the court should find that such transfer was made with intent to defraud, that being properly a conclusion of law from the facts found.

From the Marshall Circuit Court.

H. Corbin and *J. D. McLaren*, for appellants.

A. C. Capron, for appellee.

FRANKLIN, C.—Appellee commenced proceedings supplementary to execution against appellant John Ritter, and garnisheed appellants Andrew Ritter and Horace Corbin; John Ritter was defaulted. The garnishees filed answers, alleging that a part of the indebtedness of Andrew Ritter to John Ritter had been garnisheed by a prior creditor of John Ritter, and that the balance of said indebtedness, before the commencement of these proceedings, had been transferred by endorsement, for a valuable consideration, to appellant Corbin. Upon the trial appellee undertook to prove that the transfer to Corbin was fraudulent, having so averred in the complaint and affidavit.

Upon request the court made a special finding, and stated its conclusions of law thereon, in favor of appellee. Over

motions for a new trial, and in arrest, judgment was rendered for appellee.

Appellants Andrew Ritter and Horace Corbin appealed to this court, and have assigned the following errors:

The overruling of the motion for a new trial, error in the conclusions of law, and overruling the motion in arrest of judgment.

It may be questionable whether the proceedings had in this case were proper. This is a special proceeding, and largely controlled by the statute. The 822d section, R. S. 1881, provides that "all proceedings under this act, after the order has been made requiring parties to appear and answer, shall be summary, without further pleadings, upon the oral examination and testimony of parties and witnesses. But the sufficiency of the order and of the affidavit first filed by the plaintiff may be tested by demurrer or motion to dismiss or strike out the same." Neither of these modes of objection to the affidavit was adopted; but, instead thereof, a motion in arrest of judgment was made. If the parties thought it advisable to go through the regular forms of a trial as at law, and a just result was thereby reached, we do not presume that irregularities in the form will invalidate the proceedings. We will, therefore, proceed to examine the proceedings as though they were regular.

The objection to the complaint is that it does not contain any averment that John Ritter, at the time of the transfer of the notes, did not have other property subject to execution sufficient to pay all his debts.

The complaint alleges that at the time of the transfer of the notes John Ritter was notoriously insolvent, and at the commencement of this suit all of his property subject to execution had been sold under execution.

No objection was made to the complaint before trial; the defendants took the risk of a finding upon the complaint as it was, and after a finding was announced by the court, we think the complaint, as to this objection, was sufficient to

render judgment upon. There was no error in overruling the motion in arrest of judgment.

As to the second specification of errors, Corbin alone excepted to the conclusions of law, and as this alleged error was severally assigned, it brings in review the ruling as to him upon this question.

The substance of the special findings is as follows:

That on the 5th day of October, 1881, the said John Ritter was the owner of a farm of one hundred acres, of the value of $4,000, and four notes for $200 each signed by said Andrew Ritter, who is the son of said John, payable in one, two, three and four years, with a mortgage on forty acres of land to secure their payment, which was all the property that he then owned; that he then owed in judgments that were liens upon said farm the sum of $3,003.46; that appellant Corbin had been and then was his attorney and legal adviser, and as such had an account against him for such services in the sum of $200; that on said day said Ritter transferred to said Corbin said notes aggregating $800 in consideration of said account for $200, and said Corbin's note due in two years for $300; that on the 22d day of October, 1881, said Corbin paid on said note $48.72; that before said notes were so transferred to Corbin, Thomas K. Houghton & Bro. had procured, upon a judgment against said John Ritter, a judgment of garnishment to be rendered against Andrew Ritter upon said notes, in the sum of $35.63; that on the 14th day of October, 1881, one Michael Spiesshoffer recovered a judgment in the Marshall Circuit Court against said John Ritter as principal, and the plaintiff herein, George C. Goddard, as security, for the sum of $248.31, with $10.50 costs; that execution was issued upon the same, and all of said John Ritter's property that could be found was sold thereon, leaving unsatisfied thereof the sum of $238.94; that said plaintiff was compelled to and did pay the same on December 21st, 1881, and that said amount, with interest thereon, is still due said Goddard; that at the commencement of these proceed-

ings no part of the said $800 in notes had been paid by said Andrew Ritter.

Upon which the court stated as conclusions of law "that the transfer of the four notes calling for $200 each by said John Ritter, to the defendant Corbin, did not invest the said Corbin with ownership of said notes, but that so far as the creditors of said John Ritter are concerned said pretended sale is fraudulent and void, and that the only right which said Corbin acquired in said notes by his contract with said John Ritter is the right to hold them as collateral security for the claim of $200 as attorney fees, and for the payment of $48.72 cash advanced by said Corbin to said John Ritter on October 22d, 1881, and the interest accrued thereon. Said Corbin's right to hold said notes as collateral security being subject to the prior lien of Thomas K. Houghton & Bro., obtained by the judgment as above stated in garnishee proceedings against said Andrew Ritter, and that the plaintiff in this suit is entitled to hold and enforce a lien upon said four notes, after the judgment of said Thomas K. Houghton & Bro. and the claim of said Corbin shall be satisfied, for the payment of the amount of $247.48 found due him from said John Ritter as hereinbefore stated, and the interest and costs accrued thereon."

The conclusions of law then make a distribution of the proceeds of the notes as they fall due, and order the surplus, if any, to be paid to said John Ritter.

The objections to these conclusions of law are that there is no finding that in the arrangement between John Ritter and Corbin for the transfer of the notes, there was any intention to commit a fraud upon Ritter's creditors, or that the agreement was fraudulent. Facts and not conclusions are to be stated in the findings.

Under the confidential relations existing between attorney and client, and Corbin's knowledge of Ritter's business, we think, whether intended so or not, the facts stated are sufficient to constitute fraud against the other creditors of Ritter;

and we further hold that it was proper to state the facts in the findings and the conclusions in the conclusions of law. Fraud is a conclusion based upon facts. It was proper to state the facts and not the conclusions in the findings. There was no error in overruling the exception to the conclusion of law.

Under the first specification of error, the overruling of the motion for a new trial, the following reasons are stated for a new trial: That the finding of the court is not sustained by sufficient evidence, the finding is contrary to law, the finding and conclusions are not sustained by law, and are contrary to law, error occurring at the trial, and in the proceedings of the court, in this (no specifications are given).

The last three reasons stated present no question for consideration.

We have examined the evidence, and think it fully sustains the findings, and that they are not contrary to law. There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed April 2, 1884.

No. 11,115.

STAPP ET AL., ADMINISTRATORS, *v.* MESSEKE, EXECUTOR.

DECEDENTS' ESTATES.—*Claim.—Joinder of Separate Causes in One Claim.—Action by Widow.—Property of Another Converted by Administrator.*—A claim by a widow against an estate alleged that the decedent, at the death of plaintiff's husband, had possession of all the personal property of the latter, and that, on the death of the decedent, his administrator had converted the same into assets of such estate, and that she was entitled to $500 as widow. A further item of such claim alleged her right to one-third of such property, and demanded damages for its conversion. A third item alleged decedent's occupancy of her husband's land after the death of the latter, and asked recovery for rent of one-third of such land.

Held, on separate demurrer, that each item states a separate cause of action, and was sufficient.

From the Bartholomew Circuit Court.

R. Hill, M. Hacker and — *Strickland,* for appellants.

N. R. Keyes, G. W. Cooper and *C. B. Cooper*, for appellee.

BICKNELL, C. C.—Bertha Snider, in April, 1878, filed a claim against the estate of Hugh Snider, deceased. The appellants, the administrators of said estate, appeared and treated the claim as a complaint, and each of its three items as a separate paragraph, and they filed separate demurrers to each paragraph for want of facts sufficient, which demurrers were overruled. In 1881, the death of the claimant was suggested, and the appellee, Charles F. Messeke, her executor, was substituted as claimant.

In May, 1883, the parties appeared and the claim was submitted for trial to the court, who allowed the claimant $540 and rendered judgment for that amount, to be paid by the appellants out of any assets in their hands to be administered. They appealed. The overruling of each of said demurrers is assigned as error.

The statute does not require formal pleading upon a claim against an estate. *Hileman* v. *Hileman*, 85 Ind. 1. An executor or administrator may require such a claim to be brought before the court in the mode prescribed by the decedents' act, but he is not bound to do so; he may make a full appearance and demur or answer, and the court will have jurisdiction, and the parties will be bound by such subsequent pleadings, as if they were required by law. *Morrison* v. *Kramer*, 58 Ind. 38; *Niblack* v. *Goodman*, 67 Ind. 174.

And when the executor or administrator thus waives his statutory rights, his demurrer to an entire claim, consisting of several distinct items, will not be sustained, if any one of such items states a good cause of action. *Ginn* v. *Collins*, 43 Ind. 271.

In the present case, the three items of the claim state different causes of action; therefore, the appellants had a right

to demur separately to each of them. *Hannum* v. *Curtis*, 13 Ind. 206; *Huston* v. *First Nat'l Bank*, 85 Ind. 21.

A claim against a decedent's estate is sufficient, if it states the nature of the demand and the amount demanded, and enough to bar another action therefor. *Hannum* v. *Curtis*, *supra*; *Ginn* v. *Collins*, *supra*; *Post* v. *Pedrick*, 52 Ind. 490; *Dodds* v. *Dodds*, 57 Ind. 293; *Hathaway* v. *Roll*, 81 Ind. 567; *Davis* v. *Huston*, 84 Ind. 272.

The first paragraph is sufficient. It claims from the administrators of Hugh Snider's estate $500, the amount allowed the claimant by law as the widow of Frederick Snider, alleging that said Hugh Snider, when he died, had possession of all the personal property of said Frederick Snider, and that the defendants, after Hugh Snider's death, as his administrators, took said personal property and sold it as part of the estate of Hugh Snider. The substance of it is that here was personal property of the estate of the claimant's deceased husband, of which she had a right under the statute to take $500, which property was in possession of Hugh Snider when he died, and which these defendants as his administrators, afterwards sold as part of his estate; in short, that Hugh Snider's estate had the benefit of the property out of which the claimant, as the widow of Frederick Snider, had a right to take her $500.

If there was uncertainty in the claim, it might have been corrected on motion, but as a claim against an estate it was sufficient, under the authorities above cited.

The second paragraph was also sufficient. It alleged substantially, that the claimant, as the widow of Frederick Snider, was entitled to one-third of his personal property, and that the defendants, as administrators of Hugh Snider, had taken and sold said property as part of Hugh Snider's estate.

The third paragraph was also sufficient. It alleged substantially that the claimant was entitled to one-third of her deceased husband's real estate by descent, and that the defendant's intestate was tenant thereof for five years after her

husband's death, at $200 per year. The defendant's intestate was liable to the claimant for the rent of her land, and the claim therefor could be enforced against his estate. The filing of the claim was a sufficient demand. *Trimble* v. *Pollock*, 77 Ind. 576; *Wright* v. *Jordan*, 71 Ind. 1.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed April 2, 1884.

No. 11,509.

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HUDELSON ET AL. *v.* THE STATE.

CRIMINAL LAW. — *Advertising Lottery.* — *Indictment.* — *Gift Enterprise.*—An indictment, charging that the defendants, at, etc., on, etc., published an advertisement (set out) that they would, on a day named, give to the person buying goods at their store to the amount of fifty cents, and guessing nearest the number of beans in a glass globe in their window, a gold watch, is good, under section 2078, R. S. 1881, making it an offence to advertise a lottery.

SAME.—*Instructions to Jury.*—*Province of Jury.*—The jury was instructed that they were the judges of the law, and that the instructions of the court were only advisory and might be disregarded; and the next instruction was that the jury had no right to determine the question whether the facts stated in the indictment constituted a public offence, or to determine the sufficiency of the indictment; and if the facts stated therein were proven beyond a reasonable doubt they must convict.

Held, that the last instruction given, in this order, was a fatal error. ELLIOTT and HAMMOND, JJ., dissenting.

From the Henry Circuit Court.

D. W. Chambers, *J. S. Hedges* and *F. W. Fitzhugh*, for appellants.

F. T. Hord, Attorney General, and *G. W. Duncan*, Prosecuting Attorney, for the State.

ZOLLARS, J.—Section 2078, R. S. 1882, is as follows: "Whoever writes, prints, advertises, or publishes in any way,

an account of any lottery, gift enterprise, or scheme of chance of any kind or description, by whatever name, style, or title the same may be denominated or known, stating when or where the same is to be drawn, or the prizes therein or any of them; or the price of a ticket; or showing therein where any ticket may be obtained; or in any way giving publicity to such lottery, gift enterprise, or scheme of chance,—shall be fined not more than five hundred dollars nor less than ten dollars."

Appellants were convicted upon an indictment which charges them with having unlawfully written, advertised and published an account of a gift enterprise. The prosecution is based upon the above statute. The publication is set out in full in the indictment. The material portion is as follows: "Gents' Furnishing Store. Our New Year's presents for our patrons. We will give to the purchaser of fifty cents worth, or more, of goods from our stock, who guesses nearest to the number of beans contained in the glass globe on exhibition in our window, a gold watch, * * * which can be seen in our show window, commencing on Saturday, November 17, 1883, and until Tuesday, January 15, 1884. Every purchaser of goods to the amount of fifty (50) cents, or more, will receive a ticket which will entitle the recipient to one guess for the gold watch." Following this is a statement as to the committee of three persons who had put the beans into the globe; also a certificate of the committee that they had deposited the beans and sealed up the glass globe without knowing the number of beans so deposited; also a certificate as to the character and value of the watch. The purpose of the gift is stated to be the advertisement of the stock of goods, and thus draw visitors and patrons. A motion to quash the indictment was overruled. This ruling is one of the errors assigned in this court.

The contention of appellant's counsel is, that the enterprise, as set out in the publication, is not a lottery, nor in the nature of a lottery or gift enterprise. That to arrive at the

correct number of beans in the glass globe is not a matter of chance, but of mathematical calculation. We can not concur in this view. An expert mathematician might compute the dimensions of the glass globe with a reasonable degree of certainty. Necessarily, the result could be but approximately correct. To be mathematically correct, the exact thickness of the glass would have to be known. This exactness could not be attained by an observation of the sealed globe. Here would necessarily be an element of guessing. And if the exact size of the globe were known, it would be utterly impossible, by the application of mathematical rules, or by any other means, to calculate the number of beans contained in it. The size of the several beans, so far as they could be observed, would be a matter of pure guessing. And besides, only those on the surface and next to the glass could be seen. Those in the center might be smaller or larger. In short, there could be no fixed and definite fact or quantity upon which to base a mathematical calculation or demonstration. The number of beans in the globe could be nothing else than a matter of guessing. An expert mathematician might more nearly fix the size of the globe than an entirely uneducated person. And so he, and persons of better judgment, might more nearly fix the number of beans in the globe than persons of less judgment; yet the exact number would be a mere matter of guessing. That any one should guess the correct number would be a matter of the merest chance, because there are no means of attaining to a certainty.

Whether the enterprise set out in the publication be called a scheme of chance, a gift enterprise, or a lottery, it is still a scheme of chance, and in that sense a lottery or gift enterprise. *Lohman* v. *State*, 81 Ind. 15.

The watch was to be given to the person who should come nearest guessing the correct number of the beans. Who that might be would be purely a matter of chance. Whether that person might guess the correct number, would be a matter

of chance. Chance was to settle the ownership of the watch. And thus the enterprise was to be a lottery. "A lottery is a scheme for the distribution of prizes by chance—a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or other valuables." Winfield's Adjudged Words and Phrases, p. 377.

"Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." *Hull* v. *Ruggles*, 56 N. Y. 424.

"A lottery is a scheme for the distribution of prizes by chance." *Dunn* v. *People*, 40 Ill. 465. See also *State* v. *Clarke*, 33 N. H. 329.

It makes no difference that the ticket was to be procured by the purchase of goods. *Lohman* v. *State*, *supra*; *State* v. *Mumford*, 73 Mo. 647 (39 Am. R. 532); *United States* v. *Olney*, 1 Abb. U. S. 275.

The indictment, we think, was sufficient to withstand the motion to quash.

The tenth instruction given by the court is as follows: "You have no right to determine the question whether the facts stated in the indictment constitute a public offence, or to determine the sufficiency of the indictment. If the facts stated in the indictment are proven beyond a reasonable doubt, you must convict."

It is insisted that this instruction is an invasion of the rights of the jury, and an infraction of section 19 of article 1 of the State Constitution, which declares that in all criminal cases whatever the jury shall have the right to determine the law and the facts.

We can see no escape from this view, unless the instruction is so limited and modified by others as to remove the objections urged against it. The Constitution declares, in the broadest and most imperative terms, that in all criminal cases the jury shall have the right to determine the law as well as

the facts. This right has been recognized and enforced in its broadest scope by many decisions of this court. It is made the duty of the court to instruct the jury as to the law in the case, and at the same time inform them that they are the judges of the law. Section 1823, R. S. 1881. It has been held that the instructions to the jury under the Constitution and the statute are not to bind their consciences, but to enlighten their judgments; in other words, the instructions are advisory, and not binding upon the jury. *Lynch* v. *State*, 9 Ind. 541; *Williams* v. *State*, 10 Ind. 503; *Nuzum* v. *State*, 88 Ind. 599; *Powers* v. *State*, 87 Ind. 144. Notwithstanding this, if the instructions are erroneous, the judgment will be reversed. *Clem* v. *State*, 42 Ind. 420 (13 Am. R. 369).

In the case of *Daily* v. *State*, 10 Ind. 536, it was held that an instruction, in which the jury was charged "that they had nothing to do with the question as to the sufficiency of the indictment; that the court had determined that" fact, was not erroneous. That is correct in a proper sense. The jury have no right to base an acquittal upon their notion alone that the indictment is not sufficient; they have no right to determine that the indictment is not sufficient in form, or that it was not properly found and returned; they must act upon the law and the evidence, when the case comes before them. But they have the undoubted right, under the Constitution and the decisions of this court, to say that the facts in evidence do not constitute a "public offence," although those facts may be the same facts stated in the indictment. If this be not so, then the jury will be compelled to convict in all cases where the facts stated in the indictment are proved, although they may think that the facts so proved do not constitute a public offence. This would be, practically, to take from the jury the right to pass upon the law in all cases. If the proof should not sustain the averments in the indictment, they might acquit for the want of sufficient evidence; but in every case where the proof should establish the truth of the facts stated in the indictment, the jury would be compelled to convict, because

they would have no right to settle the law for themselves, and say that the facts so proven do not constitute a public offence.

Paraphrased, the instruction is a charge to the jury that, if the facts stated in the indictment were proven beyond a reasonable doubt, they must convict the defendants, and that they had no right to determine the question as to whether those facts constituted a public offence.

This, we think, is not the law; the instruction is, therefore, erroneous.

Was this error cured, or rendered harmless, by any other instruction?

In the ninth instruction, preceding the tenth, *supra*, the jury were instructed as follows: "You are the judges also of the law. It is the duty of the court to instruct you in the law, but his instructions are advisory only, and you may disregard them, and determine the law for yourselves. * * * And in determining what the law of the case is, you may consider the charges given by the court, and the decisions of the Supreme Court noted to you in argument, as evidence of what the law is." This instruction is general in its character, and in a certain sense applies to all of the instructions given by the court. The tenth, following immediately after, forms an exception to the general rule announced. Taking the two together, the jury would doubtless understand from them that as to all questions of law arising in the case, they were the judges, and that the instructions of the court were simply advisory, except that if the facts stated in the indictment were proven, they had no right to judge of the law, and say that such facts did not constitute a public offence, and must convict, whatever their ideas of the law upon such facts might be. If the ninth instruction had followed instead of preceding the tenth, we might have a different case. We are not to be understood, however, as holding or intimating that in that case the tenth would have been rendered harmless.

The rule in criminal cases is settled, in this State, that if

an erroneous instruction is given, it can not be corrected by another instruction which may state the law correctly, unless the erroneous instruction is thereby clearly withdrawn from the jury. *Clem* v. *State*, 42 Ind. 420, and cases cited; *Howard* v. *State*, 50 Ind. 190; *Wall* v. *State*, 51 Ind. 453.

For the error in giving the tenth instruction the judgment must be reversed. Some other questions are discussed, but as they may not arise upon a second trial, they need not be passed upon.

The judgment is reversed, with instructions to the court below to grant a new trial.

Filed April 4, 1884.

DISSENTING OPINION.

ELLIOTT, J.—I heartily concur in what is said in the principal opinion as to the character of the appellant's scheme described in the indictment, and regret to be compelled to dissent from the holding on the tenth instruction. It seems to me that the instruction refers to the pleading, and if this be correct, then surely it was a proper instruction, for the question of the sufficiency of a pleading is exclusively for the court; the jury have nothing at all to do with it.

If the instruction be taken to be applicable to the evidence, it is, when considered in connection with the ninth instruction, not erroneous. The court has a right to tell the jury that if all the facts stated in an indictment are proved beyond a reasonable doubt, it is their duty to convict, but such a statement, like all other matters of law, must, under our Constitution, be left to the ultimate decision of the jury. Such a statement is a direction to the jury, such as any other instruction is, and it is one which the jury may take as merely advisory. It is no more error to give such a direction than it is to charge upon any other matter of law. In both cases, however, the jury must be told, as they were told in this case, that they are the exclusive judges of the law.

HAMMOND, J., concurs with ELLIOTT, J.

Filed April 4, 1884.

No. 11,317.

COCHRAN v. ORR ET AL.

PROMISSORY NOTE.—*Principal and Surety.—Creditor's Failure to Sue.—Release of Surety.—Written Notice to Creditor by One of Two Sureties.—Effect of Such Notice.*—The mere neglect or failure of the payee or holder of a promissory note to bring suit thereon, at or after its maturity, in the absence of the "notice in writing" requiring him "forthwith to institute an action upon the contract," as provided in section 1210, R. S. 1881, will not exonerate or discharge a surety in the note from liability thereon; and where such notice has been given by one of two or more sureties, it can not be made available to the discharge of the surety or sureties, who gave no such notice, from liability on such note.

From the Fountain Circuit Court.

T. F. Davidson, C. Booe, L. Nebeker and *H. H. Dochterman*, for appellant.

J. McCabe, L. P. Miller and *C. M. McCabe*, for appellees.

HOWK, C. J.—In this case the appellees' demurrers were sustained by the circuit court to the appellant's complaint, and these rulings are assigned here as errors. The sufficiency of the facts stated in the appellant's complaint to constitute a cause of action, therefore, is the only question we are required to consider or decide.

In his complaint the appellant, Cochran, alleged that on the first day of March, 1876, he and one James Martin and others executed to the appellee John M. Carnahan a promissory note, of which the following is a copy:

"ATTICA, IND., March 1st, 1876.

"One year after date we promise to pay to John M. Carnahan, guardian of Robert E. Orr and Lawrence Orr, six hundred dollars, value received, without relief from valuation or appraisement laws; 10 per cent. per annum.

(Signed) "F. YERKES.
"WM. L. D. COCHRAN,
"A. L. WHITEHEAD,
"EDMOND COCHRAN,
"JAMES MARTIN, Security."

And the appellant averred that he and the said James Martin were sureties on such note for the other makers, and received no part of the consideration; that Franklin Yerkes was the principal debtor, and the other makers sureties for said Yerkes; that these facts were known to appellee Carnahan when he took said note; that after the maturity of the note, and in the month of March, 1877, the said James Martin gave to and served upon the appellee Carnahan, who was then and there the owner and holder of such note, a written notice to forthwith institute an action upon the note against the makers thereof; that he, Carnahan, did not institute an action on the note, as required by such notice, until the 15th day of August, 1877; that, on that day, he began an action on the note against the makers thereof, and on the 26th day of September, 1877, he obtained a judgment by default against the said makers in the court below.

And the appellant averred that, after obtaining such judgment, the appellee Carnahan did not proceed with diligence to take out an execution thereon, and did not prosecute his action to judgment and execution within a reasonable time, but delayed taking out an execution on said judgment until the 17th day of November, 1877, and thereafter failed and neglected to prosecute said execution or to cause the same to be levied upon the property of the principal debtor; that said Yerkes was then, and ever since had been, a resident of Fountain county, and had therein at the time said judgment was rendered, and for six months thereafter continued to have, ample property subject to execution to satisfy the same.

And the appellant further averred that, in a proceeding duly commenced in the court below, at its May term, 1883, wherein he was plaintiff, and said Yerkes was defendant, it was then duly adjudged by said court that he was only a surety for said Yerkes in said judgment. The appellant also averred that the appellees Robert E. Orr, J. Wilbur Orr, John C. Orr, and Richard S. Terrell, administrator of the estate of Lawrence F. Orr, deceased, claim to have acquired

some title to or interest in said judgment, and that they and the appellee Carnahan were threatening to cause an execution to issue upon said judgment against the appellant's property; that the appellee Carnahan and his co-appellees were then prosecuting a motion before the court below for leave to have an execution issued on said judgment; that appellant was the owner of real estate in Fountain county, and that said judgment was an apparent lien thereon and a cloud upon his title thereto; wherefore the appellant prayed that the appellees might be enjoined from prosecuting their motion for leave to issue execution on their said judgment, etc.

We are of the opinion that the facts stated in the foregoing complaint were wholly insufficient to entitle the appellant to any relief, legal or equitable, against the appellees or either of them, and that, therefore, no error was committed by the circuit court in sustaining the demurrers to such complaint. In section 1210, R. S. 1881, it is provided as follows: "Any person bound as surety upon any contract in writing for the payment of money or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract." And the next section, 1211, provides as follows: "If the creditor or obligee shall not proceed within a reasonable time to bring his action upon such contract, and prosecute the same to judgment and execution, the surety shall be discharged from all liability thereon."

It is manifest from the averments of his complaint that the appellant has sought to bring his case within the provisions of these two sections of the statute. He has averred that he was a surety only in the note set out in his complaint. But he has not averred that he ever required the creditor or payee of the note, by notice in writing, forthwith to institute an action upon the contract. In *Owen* v. *The State, ex rel.*, 25 Ind. 107, it was held by this court, that the mere neglect or failure of the creditor or obligee to sue, in the absence of the notice in writing required by the statute, will not exonerate

or discharge the surety from liability on the contract. *Chrisman* v. *Tuttle*, 59 Ind. 155; *Miller* v. *Arnold*, 65 Ind. 488; *McCoy* v. *Lockwood*, 71 Ind. 319; *Franklin* v. *Franklin*, 71 Ind. 573; *Mendel* v. *Cairnes*, 84 Ind. 141.

The appellant has sought to cure the manifest defect in his complaint, in this particular, by averring therein that another surety in the note, copied in his complaint, had required the creditor or payee, by notice in writing, forthwith to institute an action upon the contract, and that the creditor or payee had not, upon such written notice, proceeded within a reasonable time to bring his action upon such contract, and had not prosecuted such action with diligence to judgment and execution. If these facts had been pleaded at the proper time by such other surety, they might have afforded him sufficient ground, perhaps, to claim that he was thereby discharged from all liability upon the contract. But we fail to see upon what legal ground the appellant can claim that these facts can be made available to his discharge from all liability upon the contract. He did not require the creditor or payee, by notice in writing, forthwith to bring an action upon the contract, and, therefore, the creditor or payee did not owe him any diligence either in bringing an action upon the contract, or in prosecuting the same to judgment and execution.

We conclude, therefore, as we began, with the opinion that the demurrers to the appellant's complaint were correctly sustained. The judgment is affirmed with costs.

Filed April 2, 1884.

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No. 11,385.

HILLS *v.* HILLS.

SPECIFIC PERFORMANCE.—*Effect of Decree for Divorce.—Alimony.—Presumption of Adjudication.*—A husband, having made the first payment for, entered into possession of, and made valuable improvements on, certain real estate, which was to be conveyed to him upon full payment therefor, made a second payment thereon with money furnished him by his wife for that

purpose, and then suffered the residue to default for several years, when his wife made full payment and took title in her own name, with his knowledge, and then, upon her petition for divorce and alimony, she procured a decree of divorce, without alimony, against him, he answering only by general denial, and no evidence as to alimony having been given; afterwards he instituted an action against her and the grantor for specific performance, he having tendered to the grantor less than the amount due.

Held, as a conclusion of law, upon the foregoing facts, that in equity he ought not to maintain such action.

From the DeKalb Circuit Court.

W. L. Penfield and *H. J. Shaffer*, for appellant.

C. M. Phillips, for appellee.

BLACK, C.—The appellant sued the appellee and five others for specific performance of a contract for the sale and conveyance to the appellant by the defendants, other than the appellee, of certain real estate, a town lot.

Issues formed were tried by the court, and a special finding was rendered. The only question before us is, whether the court erred in its conclusions of law.

The facts were stated by the court, in effect, as follows: On the 4th of March, 1876, the appellant being then the husband of the appellee, the former and the defendant Biggs D. Thomas executed said contract, said Thomas being, in the transaction, agent and attorney in fact for his co-defendants other than the appellee. The contract provided, that upon prompt payment of the purchase-money, interest and taxes, the vendors would convey the real estate to the appellant by good and sufficient deed. The consideration stated was the sum of $250, to be paid in three instalments, $65 cash, $92.50 in thirteen months, and the same amount in twenty-four months, the deferred payments to bear interest at eight per cent. per annum. At the making of the contract, the appellant paid in cash thereon $65, and entered into possession, and made improvements of the value of $600, consisting of a dwelling-house, fences and fruit trees. In April, 1877, the appellant paid said Thomas on the contract $100,

about two weeks after it was due. The court stated, in its finding, that said Thomas waived strict compliance with the terms of the contract, but frequently asked the appellant to pay the residue of the purchase-money, after it became due, but he failed to do so; and on the 4th of January, 1882, there was due on the contract, $169.70. On that day, the appellee paid said Thomas $150, for which he executed to her a deed for said real estate, and surrendered to her said contract; and the deed was recorded the same day.

On the 13th of February, 1882, the appellee commenced in the court below a suit for divorce from appellant, and for $500 alimony. On the 7th of March, 1882, there was a trial, and said court decreed a divorce to the appellee from the appellant, rendering no judgment for alimony, the only answer in the cause being a general denial, and no evidence being introduced on the question of alimony or property, and the complaint containing no averment as to property matters between the parties. Before this trial in the divorce suit, the appellant knew that the appellee had obtained said deed from said Thomas, and that she claimed said property thereunder; and she had been, since the execution of said deed, and she still was, in possession of said property.

On the 11th of April, 1882, the appellant tendered to said Thomas $168, as the balance due on said contract, and demanded of him a deed for said premises, which was refused. Since the making of said tender, the appellant had been and he still was ready and willing to pay the balance due on said contract and to receive a deed from said Thomas. Said sum of $100 paid by the appellant in April, 1877, was furnished to him by the appellee for that purpose. The appellant dismissed his action as to all the defendants except the appellee.

The court stated as conclusions of law, that all questions of property between the appellant and the appellee were in controversy in said suit for divorce and are conclusively presumed to have been settled and put at rest; and that he was

entitled in this suit to no relief against any of the defendants, all of whom were entitled to recover costs of him.

The appellee having taken the legal title to the real estate with knowledge of the equitable title of the appellant, she held it as it had been held by her grantor, and, before the granting of the divorce, the appellant might have maintained against his wife a suit for specific performance. *Hunter* v. *Bales*, 24 Ind. 399; *Walker* v. *Cox*, 25 Ind. 271; *Higbee* v. *Moore*, 66 Ind. 263; *Heck* v. *Fink*, 85 Ind. 6.

In this State, a decree for alimony must be for a sum in gross, though a reasonable time for the payment thereof by instalments may be given. An independent suit for alimony can not be maintained; it can only be allowed in a suit for divorce and as incidental to a divorce. *Moon* v. *Baum*, 58 Ind. 194; *Muckenburg* v. *Holler*, 29 Ind. 139. The subject of alimony is in a certain sense necessarily involved in every suit wherein a divorce is granted, whether it be asked for in pleading or not, and whether there be any evidence on the subject or not. The appellant and the appellee were both concluded as to the subject of alimony by the decree in the divorce suit. The wife could not recover alimony in any other suit.

A decree for alimony is a personal judgment in favor of the wife. Alimony is granted in lieu of the wife's interest as wife in the estate of the husband, and of the support which a husband is bound as such to provide. *Fischli* v. *Fischli*, 1 Blackf. 360 (12 Am. Dec. 251); *Musselman* v. *Musselman*, 44 Ind. 106.

It is not needed that we should here decide whether every decree for divorce necessarily involves an adjudication and merging of any right of action one of the parties may have had, arising during the existence of the marriage relation, to enforce against the other the specific performance of a contract to convey real estate, so that no subsequent suit thereon will lie. See *Muckenburg* v. *Holler*, *supra*; *Rose* v. *Rose*, 93 Ind. 179; *Behrley* v. *Behrley*, 93 Ind. 255.

In the case before us the appellant had purchased the property by written contract, had paid $65 of the purchase-money, and had made lasting and valuable improvements. He had made a second payment of $100, furnished to him by the appellee. When he had permitted the final instalment to remain unpaid for nearly four years after it was due, the appellee paid a sum which was accepted as the final instalment, and took a conveyance to herself. Soon afterward she commenced her suit for divorce and alimony, in which the appellant filed an answer of general denial. Before the trial he knew that she had received said deed, and that she claimed the property thereunder. He took no step to assert a claim to the property until more than a month after a divorce without alimony had been granted to the appellee. He had never before the commencement of this suit tendered or offered to pay to any one the full amount due from him under the contract.

When she obtained a divorce for his fault, she was entitled to recover a judgment for alimony in a proper amount, to compensate her for the loss of her interest as a wife in his estate. He stood by, knowing her claim in regard to this property, and made no adverse claim while she changed her situation, so as to preclude her from any claim upon him for alimony. If he should now prevail against her, he would take from her the property, leaving no interest remaining in her as a marital interest or in lieu thereof.

The granting of specific performance of a contract is a matter of sound judicial discretion, to be exercised upon a consideration of all the circumstances of the particular case. The appellant has not seasonably and in good faith offered to perform his part of the contract. Hardship and injustice to the appellee would follow an enforcement of the contract against her; and the granting of specific performance can not be accompanied with such conditions as will obviate hardship and injustice; for, if the appellant should have specific performance, the appellee ought to have alimony. A court of

equity can not thus be made use of to gain assistance in doing an unfair and unconscionable thing. A decree for specific performance should be strictly equitable.

If the case be not one of estoppel by conduct, it is one wherein the party asking specific performance does not commend himself to a court of conscience, and it was proper, in the exercise of sound legal discretion, to refuse the relief sought. Whether the ground of refusal expressed was strictly correct need not be determined, so long as a correct result was reached.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed April 4, 1884.

No. 11,267.

THE STATE v. ALLEN.

CRIMINAL LAW.—*Appeal by State.—Supreme Court.—Quashing Information.—Judgment.*—An appeal may be taken to the Supreme Court by the State from a judgment quashing an information; and, as the defendant may be detained for further proceedings, such judgment is not defective merely because it contains no order for his discharge.

SAME.—*Selling Deadly Weapon to Minor.—Information.*—For information, held sufficient, for selling deadly weapon to a minor, see opinion.

From the Wells Circuit Court.

F. T. Hord, Attorney General, *J. T. France*, Prosecuting Attorney, and *J. G. French*, for the State.

J. S. Dailey and *L. Mock*, for appellee.

NIBLACK, J.—This was a prosecution, upon affidavit and information, against William R. Allen, under section 1986, R. S. 1881, for selling a deadly weapon to a minor.

Upon his appearance to the prosecution, the defendant moved to quash the information, and the proceedings upon that motion are recorded as follows: "And said motion be-

ing ready for hearing, it was submitted to court, who sustains said motion, and the said information is quashed, to which ruling the State excepts."

The State has appealed, and assigned error upon this judgment quashing the information.

The body of the affidavit was in the following words:

"Isaiah Barnes swears, that one William R. Allen, on or about the first day of December, in the year 1882, at and in the county of Wells, in the State of Indiana, did then and there unlawfully barter and trade to Wesley Powles, who was then and there a minor under the age of twenty-one years, a certain deadly and dangerous weapon, to wit: a pistol, commonly called a revolver, which could be worn or carried concealed about the person."

The charging part of the information repeated substantially the allegations of the affidavit.

The appellee has moved to dismiss the appeal, upon the alleged ground that the order quashing the information, set out as above, was not a final judgment, because it did not, also, order him to be discharged from arrest upon the information.

Section 1882 of the criminal code of 1881 provides that appeals may be taken to the Supreme Court by the State, in the following case, among others:

"Upon a judgment for the defendant, on quashing or setting aside an indictment on information."

The judgment appealed from in this case may not be strictly formal in all respects, but it was substantially sufficient to put an end to all further proceedings upon the information, and consequently was a judgment for the appellee, quashing the information, within the meaning of section 1882, above referred to. It does not necessarily follow that a defendant must be discharged to make a judgment quashing an indictment or information complete as a final judgment. After an indictment or information has been quashed, the defendant may nevertheless be detained for fur-

ther proceedings against him. R. S. 1881, section 1760. The motion to dismiss the appeal can not therefore be sustained.

No specific objection has been urged to the sufficiency of the information, and no objection in that respect has been otherwise made apparent.

We are, in consequence, justified in assuming that the motion to quash the information ought to have been overruled.

The judgment is reversed with costs, and the cause remanded for further proceedings.

Filed April 4, 1884.

No. 10,690.

BYBEE ET AL. *v.* THE STATE.

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CRIMINAL LAW.—*Obstructing Public Highway.—City Street.—Private Way Over and Above Street.—Question of Fact.*—A public street is a public highway, and the wrongful obstruction of a public street is a misdemeanor and is punishable as such, under the provisions of section 1964, R. S. 1881. The erection or maintenance of any structure for private use, such as an enclosed passage way over and above a public street or highway, which obstructs or may obstruct such street or highway, is a misdemeanor within the meaning of the statute, and is punishable as a public nuisance. Whether or not the particular structure, so erected or maintained, obstructs or may obstruct wrongfully the public street or highway, is a question of fact, in every case, for the court or jury trying the cause.

SAME.—*Errors not Discussed.—Waiver.—Supreme Court.*—In criminal, as in civil causes, errors assigned by the appellant, which are not discussed in his brief, are regarded as waived, and are not considered by the Supreme Court.

From the Criminal Court of Marion County.

U. J. Hammond, for appellants.

F. T. Hord, Attorney General, *W. T. Brown*, Prosecuting Attorney, *J. B. Elam* and *J. L. Mitchell*, for the State.

HOWK, C. J.—Addison Bybee and Julius F. Pratt were jointly prosecuted, tried and convicted, upon affidavit and in-

formation, for maintaining a nuisance. From the judgment of conviction they have appealed to this court, and have here assigned, as errors, the following decisions of the trial court:

1. In overruling their motion to quash the information;
2. In overruling their motion for a new trial; and,
3. In overruling their motion in arrest of judgment.

It was charged in the affidavit and information, that the appellants did, on the 15th day of March, 1882, in Marion county, and from that day continuously until the day of presenting such information, unlawfully and wrongfully obstruct a certain public highway in Marion county, known as "Eddy street," in the city of Indianapolis, being a street within such city, beginning at South street and extending in a southerly direction to Norwood street, South and Norwood streets both being streets of such city, by then and there unlawfully and wrongfully erecting and maintaining a certain foot-bridge, being a structure of wood and iron of a permanent character, extending from one side of said Eddy street to the other side thereof, and obstructing and hindering the good citizens of such city, county and State, in their use and enjoyment of said street as a public highway, contrary to the form of the statute, etc.

The first and third errors, assigned by the appellants, call in question the sufficiency of the facts, stated in the information, to constitute a public offence, and the jurisdiction of the trial court of the offence charged. The appellants' learned counsel has not pointed out, in argument, any objection to the sufficiency of the affidavit or information, either in form or substance; nor has he questioned, in his brief of this cause, the jurisdiction of the criminal court of the offence charged in the affidavit and information. Under the settled practice of this court, in criminal as well as in civil causes, the first and third errors must, therefore, be regarded as waived.

In their motion for a new trial, the only causes therefor assigned by the appellants were. that the finding of the trial court was contrary to law, and contrary to the evidence. On

the trial of the cause, the following facts were established by the evidence of Samuel H Shearer, Esq., civil engineer of the city of Indianapolis, to wit:

That part of Eddy street, in the city of Indianapolis, in Marion county, which lies between South street and Garden street, in such city, is a street thirty feet in width, and is an improved public highway. The defendants, Addison Bybee and Julius F. Pratt, are owners in fee of real estate which abuts that particular part of Eddy street on the east side, and are owners in fee of the real estate which abuts said part of Eddy street on the west side; their real estate on the east side is covered by one brick building, and their real estate on the west side is covered by another brick building. Said defendants, before the — day of ——, 1882, built and have since maintained, and still maintain, across said Eddy street, between the upper stories of their said two brick buildings, an enclosed passage way constructed of wood and iron, permanent in its character, and so strongly and properly built as that there is no danger of its giving way or falling.

The said enclosed passage way is six feet and four inches wide, and seven feet and six inches high. Through it passes a leather belt, connecting machinery in one of the said brick buildings with machinery in the other brick building. It is now used by the defendants and their employees, for the purpose of passing at will from an upper story of one of the brick buildings to an upper story of the other brick building, and for the purpose of carrying light articles for ordinary use in manufacturing. This enclosed passage way does not rest upon, or touch, or get support from Eddy street, at any point. Where this enclosed passage way is joined to the defendants' brick building on the west side of Eddy street, the distance from the surface of the street up to the floor of the passage way, in a straight line, is thirteen feet and three inches; in the middle of Eddy street, the distance from the surface of the street up to the floor of the passage way, in a straight line, is fourteen feet and one and one-half inches;

and where this enclosed passage way is joined to the defendants' brick building on the east side of Eddy street, the distance from the surface of the street up to the floor of the passage way, in a straight line, is fourteen feet and ten inches. At no point in Eddy street is the distance of the surface of the street to any point in the enclosed passage way less than thirteen feet three inches.

This enclosed passage way does not impede free passage or travel on foot, or with ordinary vehicles, by the public, to and fro along the said part of Eddy street. It would impede the removal of a house, or other building of size, or the passage of any vehicle or other moving thing, of a height or loaded to a height beyond the bottom of the passage way. The passage way is in the county of Marion, and State of Indiana. The defendants, Addison Bybee and Julius F. Pratt, so built and maintained, and are so maintaining, the said enclosed passage way.

Upon the foregoing evidence, the State rested its case, and the appellants introduced no evidence.

The question for decision is this: Does the evidence appearing in the record, and quoted in this opinion, show that the appellants, in maintaining the passage way described by the witness, over and across Eddy street in the city of Indianapolis, unlawfully and wrongfully obstructed a public highway in Marion county? We are of opinion that this question must be answered in the affirmative. It has been repeatedly held by this court, that a public street is a public highway. *Common Council, etc.*, v. *Croas*, 7 Ind. 9; *State* v. *Berdetta*, 73 Ind. 185 (38 Am. R. 117); *Sims* v. *City of Frankfort*, 79 Ind. 446. The obstruction of a public street wrongfully is, therefore, a misdemeanor, and is punishable, as such, under the provisions of the criminal law. Section 1964, R. S. 1881. In *State* v. *Berdetta*, *supra*, it was said: "Public highways belong, from side to side and end to end, to the public." It may be said, also, figuratively speaking, that the rights of the public, in a public street or highway, extend beneath the

surface to the center of the earth, and above its surface to the highest heavens, to such an extent, at least, that no person may wrongfully obstruct such public rights. The permanent and exclusive use and occupancy of any public street or highway by any person, by the erection or maintenance of any structure on, beneath or above its surface, which wrongfully obstructs or may obstruct such street or highway, is a misdemeanor within the meaning of the statute and is punishable as a public nuisance. Whether or not the particular structure, so erected or maintained, obstructs or may obstruct wrongfully the public street or highway, is a question of fact, in every case, for the court or jury trying the cause. *Grove* v. *City of Fort Wayne*, 45 Ind. 429 (15 Am. R. 262); *Town of Centerville* v. *Woods*, 57 Ind. 192; *City of Logansport* v. *Dick*, 70 Ind. 65 (36 Am. 166).

In the case at bar, we can not disturb the finding, or reverse the judgment below, upon the evidence.

The judgment is affirmed, with costs.

Filed April 1, 1884.

No. 10,708.

THE MCCORMICK HARVESTING MACHINE COMPANY *v.* GLIDDEN.

94 447
144 314
94 447
158 308

PLEADING.—*Exhibits.—Practice.—Presumption.*—When a pleading is founded upon a written instrument, the original, or a copy thereof, must be filed with the pleading; such instrument should also be designated so as to be identified, but if it follows the pleading it will be presumed to be the instrument referred to.

From the Henry Circuit Court.

S. H. Brown, *C. S. Hernley*, *J. Brown* and *W. A. Brown*, for appellant.

J. H. Mellett and *E. H. Bundy*, for appellee.

ELLIOTT, J.—The appellant insists that the third paragraph of the appellee's answer is bad, for the reason that it fails to

set forth a copy of the written instrument on which it is founded. The answer contains this statement: "The plaintiff represented, covenanted and warranted by its written agreement, a copy of which is herewith filed and made part hereof," but no copy of the agreement was filed with the answer. In *Brown* v. *State, ex rel.*, 44 Ind. 222, it was said: "The statute is imperative that the instrument or a copy of it must be filed with the pleading; alleging that it is filed is not enough. It must be in fact filed; and if not, the pleading is demurrable." Many cases affirm the like doctrine, among them *Montgomery* v. *Gorrell*, 51 Ind. 309; *Ashley* v. *Foreman*, 85 Ind. 55. The proper course is to identify the instrument referred to by placing upon it some mark or designation; but it is held that if the instrument follow the pleading referring to it, the presumption will be that it is the one referred to. *Carper* v. *Kitt*, 71 Ind. 24; *Hill* v. *Mayo*, 73 Ind. 357; *Peoria M. & F. Ins. Co.* v. *Walser*, 22 Ind. 73; *Reed* v. *Broadbelt*, 68 Ind. 91; *Friddle* v. *Crane*, 68 Ind. 583. In this case the instrument is not set forth with the pleading in any form. Judgment reversed.

Filed April 3, 1884.

No. 10,751.

THE NORTH CHICAGO ROLLING MILL COMPANY v. HYLAND.

MASTER AND SERVANT.—*Principal's Liability for Act of Former Agent.—Notice of Revocation.*—A foreign corporation, operating in this State through an agent, leased its works to the agent, who, without authority from such corporation, continued to operate the works in its name, and retained in his service an employee of the corporation without notice to him of the change.

Held, in an action by the employee against the corporation, that the latter is liable for the value of such service.

SAME.—*Evidence.—Non-Residence of Corporation.—Attachment.*—An allegation that a defendant in an attachment suit is a foreign corporation may be proved by oral evidence.

From the Fountain Circuit Court.

L. Nebeker and *H. H. Dochterman*, for appellant.
S. F. Wood and *J. W. Copner*, for appellee.

HAMMOND, J.—Suit by the appellee against the appellant for work and labor, with proceedings in attachment. Answer, the general denial; trial by the court; finding for the appellee in the sum of $140.20; motion for a new trial overruled, and judgment on the verdict.

It is admitted by the appellant that $60.25 of the recovery was correct. But it is insisted that for the residue, being for work done after April 1st, 1882, the appellant was not liable. The work prior to that time, about which there is no dispute, was performed by the appellee for the appellant at its coke works in Fountain county, this State. The works were operated by the appellant's agent, John J. Enders, who, as such agent, employed and paid the workmen, the appellee among the others. Enders, having leased the works of the appellant, operated them upon his own responsibility, but in the appellant's name, without its consent, during the period for which the appellant disclaims liability to the appellee. The evidence tends to show that up to May 16th, 1882, the time to which the finding was in appellee's favor, he had no notice of the change in the management of the coke works, but supposed that he was working for the appellant under the employment of Enders as its agent. We can not say that the facts and circumstances did not justify this impression, and, this being the case, we are of opinion that the appellant was liable. Story Agency, sections 470–473. "Third parties dealing *bona fide* with one who has been accredited to them as an agent, are not affected by the revocation of his agency unless notified of such revocation." *Ulrich* v. *McCormick*, 66 Ind. 243.

The attachment proceedings were based upon an affidavit, which alleged that the appellant was a foreign corporation.

It is insisted that the fact of its being a foreign corporation could be proved only by its charter or articles of association, and that the court erred in receiving oral evidence upon this point. No authority is cited in support of this proposition, and it does not impress us as being correct. Oral evidence, we think, was admissible to prove the fact in question.

The motion for a new trial was properly overruled, and the judgment is affirmed with costs.

Filed April 15, 1884.

No. 11,243.

LOWE v. RYAN ET AL.

94 450
124 94
124 449
94 450
128 147
94 450
130 595
94 450
169 402

HIGHWAYS.—*Location of.—Appeal from County Commissioners.—Practice.*—On appeal from an order of the board of commissioners establishing a highway, questions not properly made before the board, and not affecting its jurisdiction, can not be made in the circuit court.

SAME.—*Evidence.—Opinion of Witnesses as to Benefits and Damages.—Instructions.—Jury.*—On appeal on the question of damages, the remonstrant, amongst other things, called witnesses who gave their opinion that the value of his lands would not be enhanced by the proposed highway, and the petitioners were allowed in rebuttal, over objection, to put in opinions of witnesses to the effect that the value would be increased.

Held, that the remonstrant could not, under such circumstances, claim that the judgment should, on this ground, be reversed.

Held, also, that instructions, which left the jury at liberty to consider these opinions, with the other evidence, were not erroneous.

From the Jasper Circuit Court.

S. P. Thompson and *J. H. Wallace*, for appellant.

A. W. Reynolds and *E. B. Sellers*, for appellees.

ZOLLARS, J.—Appellees petitioned the board of commissioners for the location and opening of a public highway. Viewers were appointed, with directions to report at the ensuing June session of the board. At that session, the viewers made their report that they had located the highway, and that it would be of public utility. Both sides objecting to the re-

port, on account of defects in the notice issued to the viewers by the auditor, the report was not accepted by the board. An order was then made by the board that "the proper precept be issued to, and served upon, said viewers," and that they make a view as required by law, and make report at the next regular session of the board.

At the September session of the board, the viewers reported that the proposed highway would be of public utility, and that they had marked and laid out the highway forty feet wide, twenty feet on each side of the line given in the petition, which was also given in the report. After the report was filed appellant moved to set it aside. In this motion no defects are pointed out, nor reasons assigned. After the motion was overruled, appellant and others filed a remonstrance, on the ground that the proposed highway would not be of public utility.

A second set of viewers were appointed to make a view and report upon the question of the public utility of the proposed road. These viewers reported at the ensuing December session of the board, that the road, as located, would be of public utility. Upon the reception of this report appellant filed a remonstrance, claiming damages. Reviewers were appointed, and, at the ensuing March session, reported that appellant was not entitled to any damages. A final order was then made establishing the highway as located by the viewers. From this order appellant appealed to the circuit court. After this appeal the venue was changed from the White to the Jasper Circuit Court, from which court this appeal is prosecuted.

In that court, appellant moved to set aside the report of the viewers who located the highway and reported upon the question of public utility. That motion was based upon reasons therein stated. In this, it differed from the motion made in the commissioners' court. In that motion, as we have seen, no defects in the report were pointed out, nor were any reasons assigned why the motion should be sustained,

and the report rejected. The motion was so general and indefinite as to present no question to the board. The motion in the circuit court was therefore new, and presented to that court what had not been presented, nor urged, before the board of commissioners. Whatever may be, or should be, the proper practice in the circuit court, when the board of commissioners may have improperly overruled objections to reports of viewers, it is manifest that a proper practice requires that all objections to such reports should be first presented in the commissioners' court. On such a presentation, the board might sustain the motion, and thus save further errors and costs. This comports with the well settled doctrine of this court, that, in such cases, all objections not made before the board of commissioners are regarded as waived. *Green* v. *Elliott*, 86 Ind. 53; *Breitweiser* v. *Fuhrman*, 88 Ind. 28; *Rominger* v. *Simmons*, 88 Ind. 453; *Peed* v. *Brenneman*, 89 Ind. 252.

The motion in the circuit court included, also, the report of the viewers appointed upon the remonstrance that the proposed road would not be of public utility. As no objections were made to this report in the commissioners' court, this motion came too late. It may be observed, too, that the motion, as to both reports, was based in part upon matters not apparent upon the face of the record of the proceedings.

For the reasons stated, we think that the court did not err in overruling the motion to set aside the reports.

In the circuit court, appellant asked leave to file what he calls a plea in abatement. This was refused, and we think properly so.

In that so-called plea, appellant set up that the highway, as laid out and located, would pass through his enclosure of more than one year's standing, and that he had not given his consent to such location. No such question was made in the commissioners' court, and could not therefore be made in the circuit court. *Cummings* v. *Shields*, 34 Ind. 154; *Fisher* v. *Hobbs*, 42 Ind. 276.

In what we have said, we should not be understood as holding that such facts could in any case be set up by plea in abatement; nor that a remonstrance may not, in a proper case, be amended in the circuit court, or filed there for the first time. See *Breitweiser* v. *Fuhrman, supra.*

On the trial before the jury, appellant introduced witnesses who testified to the value of appellant's land that would be taken for the highway, the cost of constructing additional fences, etc., and, finally, that the market value of appellant's lands would not be increased by the proposed highway.

In rebuttal, appellee's witnesses were allowed to testify that appellant's land, three hundred and twenty acres, would be increased in market value from three to five dollars per acre. Appellant objected to this evidence in rebuttal, and asks a reversal of the judgment upon the ruling of the trial court in admitting it. Appellant first sought and took the opinion of his witnesses as to whether or not the market value of his lands would be increased or diminished by the proposed highway. Having done so he is not in a position to ask a reversal of the judgment, because his adversaries were allowed to meet his case with like opinions from their witnesses. See *Gaff* v. *Greer*, 88 Ind. 122.

As both sides took the opinions of their respective witnesses, the probability is that the advantages and disadvantages to each thereby were about equal. However that may be, we think that the admission of the evidence in rebuttal, under the circumstances, was not such an error as would justify a reversal of the judgment.

Objection is made to some of the instructions. The objection seems to be that they left the jury free to act upon the opinions of witnesses as to the benefits and damages to appellant's land by the opening of the highway. This objection is not well taken. If there was error it was in the admission of the testimony. Having been admitted, it was the right and duty of the jury to consider it. The instructions, however, made no reference to any specific item or class of testimony,

but gave to the jury a correct rule for the measure of damages upon all of the testimony before them.

Objections are urged to the petition, the order of the board appointing the viewers, and the notice issued to them by the auditor. These objections are not such as affect the jurisdiction of the board of commissioners. Not having been made in the commissioners' court, they were waived, and could not be made for the first time in the circuit court by a motion to arrest the judgment; nor can they be made in this court. *Green* v. *Elliott, supra; Sowle* v. *Cosner*, 56 Ind. 276; *Turley* v. *Oldham*, 68 Ind. 114.

There being no available error in the record, the judgment is affirmed with costs.

HAMMOND, J., did not participate in the decision of this cause.

Filed April 16, 1884.

No. 10,129.

THE LAKE ERIE AND WESTERN RAILWAY COMPANY v. KNEADLE.

RAILROAD.— *Killing Stock.—Fencing.— Burden of Proof.*—The liability of railroad companies for cattle killed, created by statute for failure to fence, depends upon whether they are bound to fence at the place where the cattle enter upon the track. The *onus* of proving that there was no sufficient fence at that place is on the plaintiff, and then the defendant must show a sufficient excuse therefor.

SAME.—A railroad company is not bound to place fences or cattle-guards where they would interfere with the transaction of its business or endanger its servants.

From the Benton Circuit Court.

H. W. Chase, F. S. Chase and *F. W. Chase*, for appellant.
C. E. Lake and *J. S. McMillin*, for appellee.

ELLIOTT, J.—The appellant prosecutes this appeal from a judgment rendered against it for the value of two cows killed by one of its locomotives.

Our decisions firmly settle the law that the liability of railroad companies for killing cattle depends upon whether they were bound, under the statute, to fence at the place where the cattle entered upon the track. It is not material whether the place where the cattle were killed was or was not one which the company was required to fence, but the material inquiry always is whether the cattle entered at a place where it was the statutory duty of the company to securely fence. *Louisville, etc., R. W. Co.* v. *Overman*, 88 Ind. 115; *Wabash, etc., R. W. Co.* v. *Forshee*, 77 Ind. 158; *Jeffersonville, etc., R. R. Co.* v. *Lyon*, 72 Ind. 107; *Toledo, etc., R. W. Co.* v. *Howell*, 38 Ind. 447.

We are, therefore, to examine the evidence in this case, not with a view of ascertaining whether it was the duty of the appellant to fence at the place where the appellee's cows were killed, but whether it was the company's duty to fence at the place where the cattle entered upon the track.

The evidence shows that the animals were killed on the main track of the company, at a station called Talbot, and immediately opposite a large grain elevator. It also appears that at this point there was a spur, or side-track, used by the company for freight cars and for receiving and unloading grain, lumber, and other freight. The testimony does not directly show at what point the cows came upon the track, but it does clearly show that on the south side of the tracks there was a secure fence, and that on the north side there was a steep embankment down which cows would not go. The inference from the evidence is that appellee's cows entered upon the track at a place where it would have interfered with the business of the company in handling cars or in receiving and discharging freight, or else at a place where it would have endangered the lives of persons in the employment of the company, to have placed cattle-guards.

The plaintiff in such an action as this has the burden of showing that the animals entered at a place where the railroad was not fenced, and it is doubtful whether it can be said

that there is any evidence showing where the cows did enter; but yielding the appellee the benefit of the doubt, and inferring in his favor that they did enter at a place where the track was not fenced, we are bound to also infer that the place where they entered was a place where the company was under no legal obligation to fence.

It is true that when the plaintiff proves that the place was not fenced, the burden is devolved upon the defendant of showing an excuse for not fencing. In this case we think the evidence does show that the side of the spur track could not have been fenced without injury to the business of the company, and it is established by many cases that railroad companies are not bound to fence at such places. The evidence brings the case fully within the decision in *Cincinnati, etc., R. R. Co.* v. *Wood*, 82 Ind. 593, and cases there cited.

A cattle-guard could not have been placed at the crossing of the street called West street without endangering the lives of persons engaged in managing the freight trains of the company. The adjudged cases declare that a railroad company is liable to its servants if it negligently or wrongfully makes unsafe and dangerous places in its tracks. Its duty with respect to its track is much the same as that to which it is held respecting its machinery. *Allen* v. *Burlington, etc., R. R. Co.*, 5 Am. & Eng. R. R. Cas. 620; *Snow* v. *Housatonic R. R. Co.*, 8 Allen, 441; *Lewis* v. *St. Louis, etc., R. R. Co.*, 59 Mo. 495 (21 Am. R. 385); *Plank* v. *N. Y., etc., R. R. Co.*, 60 N. Y. 607. In the recent case of *Evansville, etc., R. R. Co.* v. *Willis*, 93 Ind. 507, we held that a railroad company was not bound to place cattle-guards where they would endanger the lives of their servants. It seems to us that any other conclusion would be radically wrong, for it would place the company in the dilemma of becoming liable to its servants if it constructed cattle-pits at places where they would be dangerous, and liable to cattle-owners if it neglected to provide such guards.

The jury found, in the answers to interrogatories, against

the appellee on the question of the duty of the appellant to fence, and took, substantially, the same view of the evidence that we have done, so that the case really turns upon the question whether a cattle-pit at the intersection of West street would have been dangerous. The answer of the jury to the question as to whether the pit would have made the track dangerous is in these words, "Not naturally dangerous," and this, it is manifest, is an equivocal answer, for the question, in form, properly admitted of a simple affirmative or negative answer. We, therefore, feel less delicacy in setting aside the verdict than we should have done had there been a direct finding upon this point. It is clear to us from the evidence that a new trial should be awarded.

Judgment reversed.

HAMMOND, J., did not take any part in the decision of this case.

Filed April 4, 1884.

No. 11,143.

THE SECOND NATIONAL BANK OF LAFAYETTE v. COREY ET AL.

94 457
128 231

94 457
135 252
136 178

94 457
138 552
139 205

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140 123

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147 147

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150 606

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156 622
156 623
156 625

REAL ESTATE.—*Recovery of Possession.—Complaint.—Demurrer.*—In an action to recover the possession of real estate, the complaint must show, under the provisions of section 1054, R. S. 1881, that the defendant unlawfully keeps the plaintiff out of possession, or it will be held bad on a demurrer thereto for the want of sufficient facts.

SAME.—*Action to Quiet Title.*—Under the provisions of section 1070, R. S. 1881, in an action to quiet the title to real estate, the complaint must show that the defendant's claim is adverse to the title asserted by the plaintiff, or is unfounded and a cloud upon the plaintiff's title; otherwise the defendant's demurrer thereto, for the want of sufficient facts, must be sustained.

SAME.—*Sheriff's Sale and Deed.—Defective and Void Description.—Possession.—Defence.—Statute of Limitations.*—Where real estate is sold by the sheriff by a defective and void description thereof, in the levy of the execution, advertisement, sale and conveyance of the land, and possession follows

such sale and conveyance, the ten years' limitation provided in the *third* clause of section 293, R. S. 1881, will constitute a complete and effective defence to any action brought for the recovery of such real estate by the execution debtor, or by any person claiming under him, by title acquired after the date of the judgment.

From the Tippecanoe Circuit Court.

R. Jones, for appellant.

J. L. Miller, *M. Jones*, *T. B. Ward*, *G. W. Collins* and *K. M. Hord*, for appellees.

HOWK, C. J.—This was a suit by the appellant, as plaintiff, against the appellees Thomas Corey and Carrie S. Corey, his wife, Kendall M. Hord, Alfred Major, Frank M. Milligan and Benjamin McCrea, as defendants. The object of the suit was to recover the possession of "sixty acres of land off of the north end of the west half of the southwest quarter of section four, in township twenty-three north, of range five west, in Tippecanoe county, Indiana," and to quiet the appellant's title thereto. The appellees were either defaulted, or they disclaimed, in the circuit court, except Kendall M. Hord, and the controversy, there and in this court, was and is between him and the appellant.

The appellee Hord answered in three paragraphs, of which the first was a general denial, and in the second and third paragraphs he stated special or affirmative matters, by way of defence. He also filed a counter-claim or cross complaint, in six paragraphs. The appellant replied specially to each of the second and third paragraphs of Hord's answer; and to these special replies Hord's demurrers, for the want of sufficient facts therein, were sustained by the court. To these rulings the appellee excepted, and declining to amend its replies, or to reply further to the second and third paragraphs of answer, the court rendered judgment thereon against the appellant, and in favor of the appellee Kendall M. Hord.

In this court, the appellant has assigned, as errors, the decisions of the circuit court, (1) in overruling its demurrer to the second paragraph of Hord's answer, and in sustaining

Hord's demurrers (2) to appellant's first reply to the third paragraph of his answer, (3) to appellant's second reply to the second paragraph of his answer, and (4) to appellant's second reply to the third paragraph of his answer.

The appellee Hord has assigned cross errors upon the record of this cause, of which cross errors the first is that "The plaintiff's complaint does not state facts sufficient to constitute a cause of action against him." In the natural order of things, this cross error is first entitled to our consideration.

In its complaint, the appellant complained of all the appellees, named in the outset of this opinion, except Benjamin McCrea, and said: "That the plaintiff is the owner in fee simple and entitled to the immediate possession of the following described real estate, in said county, to wit:" (description heretofore quoted;) "that the defendants Thomas and Carrie are in possession of said land, and wrongfully keep the plaintiff out of possession thereof; that said lands are of the fair rental value of $250 per year." The plaintiff further says that each of said defendants claims some right or title to, or some interest in, said lands. The plaintiff asks the following relief:

"That its title to said lands be declared and quieted;

"That it have judgment for the possession of said land and for $400 damages for the detention thereof, and for all other and further proper relief."

In considering the sufficiency of the facts stated in appellee's complaint to constitute a cause of action against the appellee Hord, it must be borne in mind that in this case it can not be said that the complaint is aided by the evidence or cured by the verdict. The cause was decided below upon the insufficiency of the appellant's pleadings, and the sufficiency of the pleadings is to be determined by this court, without aid from the evidence. In other words, in the condition of the record, the appellee Hord's cross error presents to this court for decision the question of the sufficiency of appellant's complaint, precisely as such question would have been pre-

sented to the circuit court, if Hord had there demurred to such complaint for the want of sufficient facts.

The complaint, it will be observed, contains but one paragraph; but, in that paragraph, the appellant has attempted to blend a declaration at common law in ejectment, and a bill in equity to quiet its title. It is true that, in section 1 of the code of 1881 (section 249, R S. 1881), it is declared, "There shall be no distinction in pleading and practice between actions at law and suits in equity." But it is also true that section 372 of the same code (section 409, R. S. 1881) makes a wide distinction, in practice at least, between actions at law, like an action of ejectment, and suits that, "prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction," such as a suit to quiet the title to real estate. This latter section does not, in terms, make or declare any distinction, in pleading, between actions at law and the suits in equity therein mentioned; but, by implication, it suggests the query whether or not, in view of its provisions, a cause of action at law and such a cause, of exclusive equitable jurisdiction prior to June 18th, 1852, can be properly united in a complaint of a single paragraph. This query is suggested in the interest of good pleading, but is not decided.

Does the appellant's complaint state facts sufficient to constitute a cause of action against the appellee Kendall M. Hord? As a complaint to recover the possession of the real estate in controversy, no argument would seem to be necessary to show, that it is hopelessly bad as against the appellee Hord. In section 1054, R. S. 1881, it is provided as follows: "The plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession."

In its complaint in this case, it will be seen that the appellant states, that the defendants Thomas and Carrie S. Corey "are in possession of said land and wrongfully keep the plaintiff out of the possession thereof." But it is nowhere alleged in

the complaint, that the appellee Hord, or any one claiming under him, wrongfully or unlawfully, or otherwise, kept the plaintiff out of the possession of the land, described in its complaint. Section 1054, *supra*, is substantially a re-enactment of section 595 of the civil code of 1852. 2 R. S. 1876, p. 251. Under the latter section, in *McCarnan* v. *Cochran*, 57 Ind. 166, it was held that a complaint for the recovery of real estate, wherein the plaintiff failed to allege that the defendant unlawfully kept him out of possession, was bad for the want of sufficient facts. To the same effect are the cases of *Vance* v. *Schroyer*, 77 Ind. 501, and *Levi* v. *Engle*, 91 Ind. 330. It is clear therefore that the appellant's complaint, in so far as it seeks to recover the possession of the real estate described therein, does not state facts sufficient to constitute a cause of action against the appellee Hord.

Does the complaint state sufficient facts to show that the appellant is entitled to a judgment or decree, quieting its title as against the appellee Hord, to the real estate described therein? We are of opinion, that this question ought to be and must be answered in the negative. In section 1070, R. S. 1881, it is provided as follows:

"An action may be brought by any person either in or out of possession, or by one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title."

This section is a re-enactment of section 611 of the civil code of 1852, 2 R. S. 1876, p. 254. Its provisions have been liberally construed by this court. While it has been held, that the plaintiff need not state in his complaint, with much particularity, the nature of the title or interest claimed by the defendant, in or to the real estate in controversy, yet it has been uniformly held that the complaint must show, that the defendant's claim is adverse to the title asserted by the plaintiff, or is unfounded, and a cloud upon the plaintiff's

title. *Marot* v. *Germania, etc., Ass'n*, 54 Ind. 37; *Jeffersonville, etc., R. R. Co.* v. *Oyler*, 60 Ind. 383; *Schori* v. *Stephens*, 62 Ind. 441.

In the case in hand the only averment in the complaint upon which the claim for the quieting of title can possibly be founded is the following: "The plaintiff further says that each of said defendants claims some right or title to, or some interest in, said lands." It is nowhere averred in the complaint that the right, or the title, or the interest, claimed by the appellee Hord, in or to the lands described, was adverse to the appellant's alleged ownership thereof, or was an unfounded claim on the part of Hord, or was a cloud upon the title asserted by the appellant. Every fact stated by appellant in its complaint might have been strictly and literally true, precisely as alleged, and yet the complaint failed to state any cause of action against the appellee Hord, and in the appellant's favor, either for the recovery of the real estate or for the quieting of its title thereto. It follows, therefore, that the cross error assigned by appellee Hord, calling in question the sufficiency of the facts stated in the appellant's complaint to constitute a cause of action against him, is well assigned, and entitles him to an affirmance of the judgment.

This conclusion disposes of this appeal; but in view of the fact that it does not affect the merits of the cause, and of further possible proceedings therein, we will briefly consider some of the questions presented by appellant's assignment of errors, and elaborately discussed by its learned counsel.

The first error assigned by appellant is the overruling of its demurrer to the second paragraph of answer of the appellee Kendall M. Hord. In this second paragraph of answer the appellee Hord alleged that, on September 8th, 1870, one Luther Jewett brought an action, in the Tippecanoe Circuit Court, against Benjamin H. McCrea and others, on a promissory note for $800, executed on February 12th, 1870, payable four months after its date, and then due and wholly unpaid, and bearing interest at the rate of ten per cent. per an-

num; that a summons was duly issued and served on the defendants in such action, more than ten days before the first day of the next succeeding term of such court; that such defendants appeared and answered the complaint in such action, and such proceedings were had therein as that afterwards, on the — day of January, 1871, the said Jewett recovered a judgment against the said defendants in such court, for $899.94 and costs, with interest as aforesaid; that at said date the said McCrea was the owner in fee simple, and in the possession, of the land described in appellant's complaint herein, and such judgment became a lien thereon, and such land was the only land the said McCrea had any title to or interest in, in said section four; that on July 29th, 1871, the said Jewett sued out of said court an execution on his said judgment against the property of said McCrea and his co-defendants in such judgment; that, under and by virtue of such execution, the sheriff levied upon the property described in appellant's complaint as the property of said McCrea, and, having advertised the time and place of sale in the manner prescribed by law, on the 16th day of September, 1871, offered and sold the said property in fee simple, according to law, to the said Luther Jewett, for the sum of $707.84, he being the highest and best bidder, and that being the highest and best bid therefor, he, Jewett, then and there understanding that he was bidding for and purchasing the land described in appellant's complaint, with which he was familiar, and well knew its location, and that it was the only land owned by said McCrea in that locality, and that the sheriff fully understood he was levying upon and selling the land described in appellant's complaint; and that the said Jewett, understanding that he was purchasing the said land, paid the sheriff the full amount of his bid therefor, which was applied to the payment of said judgment and costs.

The appellee Hord further alleged that, on said 16th day of September, 1871, the sheriff executed to said Jewett a certificate of the sale of said land, and, before the expiration of

the year for redemption, sold and transferred such certificate to Thomas Corey, who transferred the same to Carrie S. Corey, and that, on September 17th, 1872, the proper sheriff executed to said Carrie S. Corey a deed conveying to her the said land; that on said day the said McCrea, fully understanding that said land had been so sold and conveyed, voluntarily gave up and surrendered the possession thereof to said Carrie S. Corey, who took full and complete possession of said land to its full limits and boundaries, as described in the complaint; that the appellee Hord held by and through proper and successive conveyances, in due form of law, from the said Carrie S. Corey, and he and his grantors had been continuously in the uninterrupted possession of said land, from the date of said conveyance to Carrie S. Corey to this date, namely, February 5th, 1883, and were then in the lawful and unobstructed possession of the same, claiming title thereto under said sale and conveyance, adversely to the appellant and all others.

The appellee Hord further averred that the sheriff, by mistake or inadvertence, in his levy, advertisement and deed, described said land as "sixty acres, being a part of the west half of the southwest quarter of section four, in township twenty-three north, of range five west, in Tippecanoe county, and State of Indiana," being the same lands described in appellant's complaint.

It was further averred by appellee Hord, that the only claim or title the appellant had to the land in suit, was by virtue of a sheriff's sale made against the lands of said McCrea, on December 31st, 1881, on a judgment rendered against him on November 26th, 1872, in the Tippecanoe Circuit Court, which was junior to the Jewett judgment under which the appellee Hord held possession and claimed title; that the appellant, at the time of the sale and its purchase under such junior judgment, had full notice of all the facts in regard to the possession and title of the appellee Hord and his grantors. Wherefore the appellee Hord said the appellant had

not brought this action to recover the said land within ten years from September 16th, 1871, the date of the aforesaid sale under the Jewett judgment, and the appellant's right of action was barred by the lapse of time.

The record of this cause shows that appellant's complaint was filed, and a summons issued thereon for the appellee Hord, on the 5th day of April, 1883. In the second paragraph of his answer, a summary of which we have given, the appellee Hord pleaded the limitation declared in the *third* clause of section 293, R. S. 1881, in bar of the appellant's action. In this section of the code it is provided:

"The following actions shall be commenced within the periods herein prescribed, after the cause of action has accrued, and not afterward: * * * *

"*Third.* For the recovery of real property sold on execution, brought by the execution-debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within ten years after the sale."

This is a re-enactment of the *third* clause of section 211 of the civil code of 1852. 2 R. S. 1876, p. 123.

In discussing the alleged error of the court in overruling the appellant's demurrer to the second paragraph of Hord's answer, its learned counsel says: "The objection to the second paragraph of the answer is that the description in the levy, advertisement, and all the subsequent proceedings," under the Jewett judgment and execution, "is fatally defective—does not describe the land described in the complaint; and that the allegations, as to the intention of the sheriff, the belief of the purchaser, etc., do not help it." With regard to the limitation pleaded by Hord, appellant's counsel further says:

"There is no doubt but the statute will operate, wherever real property has been *sold* by the sheriff on execution; that no irregularity in the proceedings, or defect in the judgment, will prevent the statute from operating, provided the real property is sold on execution. There is no defect in the Jewett

judgment or irregularity in the subsequent proceedings, and if the realty described in the complaint had been *sold* on the execution, the title would have passed to the purchaser. He got no title, because there was not a *sale* of this realty, and for no other reason. It would seem to follow, if this realty was not *sold* on the execution, the ten years' limitation can not bar the operation of the plaintiff's title."

This is the substance of the argument of appellant's counsel against the sufficiency of the second paragraph of Hord's answer. The position of counsel, as we understand his argument, is that where real property is sold on execution by a defective and insufficient description, the lapse of ten years after such sale will not bar an action for the recovery of such realty by the execution debtor, or by any person claiming under him. Counsel does not state his position precisely as we have stated it; but, when his argument is applied to the case made by the second paragraph of Hord's answer, admitted to be true by the appellant's demurrer, it will be seen that either we have correctly stated his position, or that his argument is not applicable to the error under consideration. By the demurrer to the second paragraph of answer, it is conceded to be true that at the date of the Jewett judgment the judgment debtor, McCrea, was the owner in fee simple, and in possession, of the land described in the complaint, which was the only land he, McCrea, had any title to or interest in, in said section; that this land, by virtue of an execution on the Jewett judgment, was levied upon, advertised, sold, and subsequently conveyed as the property of said McCrea; and that, through certain mesne conveyances, appellee Hord held the title to, and possession of, said land under such sale on execution. It was further admitted by the demurrer that the land thus sold on execution was correctly described as to its quantity or number of acres, as to the quarter-section and the half of such quarter, as to the numbers of section, township and range, and the county and State, wherein it was located, in the levy, advertisement, sale and conveyance thereof; in-

deed, it is apparent that the only ground upon which the description of the land in the levy, advertisement, sale and conveyance thereof, under the Jewett judgment and execution, can be held to be "fatally defective" and insufficient, is that it does not locate the "sixty acres" in any specified part of the west half of the southwest quarter of said section four.

We are of opinion that where land is sold by a defective and insufficient description in the levy of the execution, advertisement, sale and conveyance of the land, and possession follows such sale and conveyance, the ten years' limitation will constitute a complete and effective bar to any action brought for the recovery of the land by the execution debtor, or by any person claiming under him by title acquired after the date of the judgment. Nothing can be said of a sale of land by such a defective and insufficient description further than to say that it is void and passes no title. But the statute of limitations above quoted applies to just such a sale. Thus, in *Brown* v. *Maher*, 68 Ind. 14, in speaking of the limitation heretofore quoted, this court said: "It applies to void sales. If it did not, it would be a dead-letter; for, if sales are not void, the purchaser needs no statute of limitations to protect his title. See the case of *Hatfield* v. *Jackson*, 50 Ind. 507, and authorities there cited." *Ray* v. *Detchon*, 79 Ind. 56.

In support of his position, the appellant's counsel has cited the cases of *Shoemaker* v. *McMonigle*, 86 Ind. 421, *Miller* v. *Kolb*, 47 Ind. 220, and *Lewis* v. *Owen*, 64 Ind. 446. From an examination of these cases, however, it will be readily seen that neither one of them is in point upon the question we have been considering. Indeed, upon a careful and thorough examination of the reported decisions of this court, we have been unable to find that the precise question here presented has ever been considered or decided by this court. We do not doubt, however, but that we place a just and proper construction upon the statutory limitation above quoted, in holding as we do that it applies to the case in hand, and constitutes a complete bar to the maintenance of

this action by the appellant, against the appellee Hord. The court did not err, therefore, in overruling the appellant's demurrer to the second paragraph of Hord's answer.

One other error, assigned by the appellant, is discussed by its counsel, namely: "The court erred in sustaining the demurrer of said Hord to the appellant's second reply to the second paragraph of said Hord's answer."

We have already given a full summary of the facts stated by Hord, in the second paragraph of his answer. In its second reply to this paragraph of answer, the appellant said that it admitted the rendition of the judgment, in favor of Luther Jewett, and the issue of execution thereon, as alleged in the second paragraph of answer, and that, at such times, the said McCrea was the owner in fee simple of the realty described in the complaint, and was not the owner of any other part of said section of land; and that the appellant averred, that said McCrea continued such owner until the — day of November, 1882, when his title thereto vested in the appellant; and the appellant admitted, that said Jewett caused an execution to be issued on his judgment, as alleged, to the sheriff of Tippecanoe county; and the appellant averred, that said execution was levied by such sheriff on "60 acres, being a part of the west half of the south-west quarter of section four, in township twenty-three north, of range five west, in Tippecanoe county and State of Indiana; that in the advertisement of sale under said execution, the sale, the certificate of sale to said Jewett, the return to such execution, and in the sheriff's deed in pursuance thereof to Carrie S. Corey, as the assignee of said certificate, the description was that herein above set out, and not otherwise in any particular, nor was there any other execution ever issued on the Jewett judgment; that the sheriff's deed was made to said Carrie S. Corey on September 17th, 1872, more than ten years before the commencement of this suit; and the appellant denied each and every allegation of said paragraph of answer, ex-

cept such as are herein admitted; wherefore the appellant denied that the lands, described in its complaint, were ever sold by the sheriff of such county to Luther Jewett, or a certificate of sale thereof made to said Jewett, or a deed thereof executed by the sheriff to said Carrie S. Corey, as alleged in the second paragraph of Hord's answer."

We are of opinion, that this second reply did not contain sufficient facts to show that the limitation pleaded by appellee Hord, in the second paragraph of his answer, was not a complete and effective bar to the suit brought by the appellant, claiming under McCrea, the execution debtor, by title acquired after the date of the Jewett judgment. Indeed, it seems to us that the appellant has not stated, in its second reply, the material facts in relation to the sale of McCrea's real estate, under the Jewett judgment and execution, substantially different from the statement of the same facts by the appellee Hord, in the second paragraph of his answer. In argument, the appellant's counsel places much stress on the denial, in the second reply, of the allegations in the second paragraph of answer, in relation to the sheriff's intention, and the purchaser's belief, in connection with the sale under the Jewett execution. Independently of those allegations, however, enough is stated by appellee Hord, in the second paragraph of his answer, and admitted or shown to be true in the appellant's second reply, to demonstrate that the ten years' limitation was applicable to the case in hand, and, as pleaded by Hord, constituted a complete bar to the appellant's cause of action. Our conclusion is, therefore, that the court committed no error in sustaining the demurrer of the appellee Hord to the second reply of the appellant to the second paragraph of his answer.

The judgment is affirmed with costs.

Filed Jan. 25, 1884. Petition for a rehearing overruled April 2, 1884.

No. 9855.

SIMPKINS ET AL. *v.* SMITH.

94 470
125 51
94 470
146 597
94 470
153 691
94 470
157 184

PROMISSORY NOTE.—*Suit by Assignee.—Averment of Title.*—In a suit upon a promissory note by the assignee of the payee, an averment in the complaint, that "the payee assigned the note to the plaintiff by endorsement," is sufficient.

SAME.—*Fraudulent Conveyance.—Complaint.—Insolvency.*—In an action to set aside a conveyance as fraudulent, an averment, that the debtor "has not now, nor has he since the note was executed had, any property subject to execution more than the exemption allowed by law," is sufficient.

SAME.—The fact that one of the notes sued upon was not due did not render the paragraph, based upon both, bad.

SAME.—*Evidence.—Vendor and Vendee.*—When in such suit the vendee only denies the fraud imputed to her, it is unnecessary to read in evidence the endorsements upon the notes, as the plaintiff's title to the notes is not put in issue.

SAME.—*Instruction.*—When in such suit it is admitted that the vendees did not have, nor has either of them since the debt was created had, any property subject to execution, it is not error to instruct the jury that if the property was conveyed and accepted for the purpose of defrauding the vendor's creditors, such conveyance was fraudulent and void.

SAME.—*Hearsay Evidence.*—The statements of the vendee's father, that he intended to give her the land subsequently conveyed by him to her husband, was mere hearsay, and inadmissible.

PRACTICE.—*Instructions.*—Where a party desires the court to call the attention of the jury to any particular aspect of his defence, he must prepare and request the proper instruction.

SAME.—There is no error in refusing to give an instruction, though correct as an abstract proposition, where it is not applicable to the case made by the evidence.

From the Warren Circuit Court.

W. P. Rhodes, J. McCabe and *E. F. McCabe,* for appellants.

J. M. Rabb and *C. V. McAdams,* for appellee.

BEST, C.—The appellee brought this action against the appellant Margaret E. Simpkins, her husband Robert J. Simpkins, and her son Justin C. Simpkins, to recover a judgment upon two notes made by the husband and son to Lasker O'Connell, who endorsed them to the appellee, and to set

aside as fraudulent a conveyance made by the husband to the wife.

The complaint consisted of two paragraphs. The first was upon a note of $1,300, and the second upon the same note and another of $800, which had not then matured, both of which were made to Lasker O'Connell, and were alleged to have been assigned by him to the appellee by endorsement. It was also averred that the husband, without consideration, and for the purpose of defrauding his creditors, conveyed all his property subject to execution, to the appellant, who took it with notice of such intention and to aid him in such purpose, and that neither the husband nor son, at the time of such conveyance, had or since has had any property subject to execution. Wherefore, etc.

The appellant's demurrer to each paragraph of the complaint was overruled, and she answered, admitting the conveyance but denying all averments charging her with fraud. The son was defaulted, and the husband filed an answer of denial. The issues were tried by a jury and a verdict returned for the appellee, upon which a judgment was rendered for the amount due upon the note of $1,300, and declaring said conveyance fraudulent and void.

A motion for a new trial by the appellant was overruled, and she alone appeals, assigning the ruling upon the demurrer and upon the motion for a new trial as error.

The first objection made to each paragraph of the complaint is, that neither of them shows any title in the appellee to the notes. The averment that the payee assigned them to the appellee by endorsement is sufficient. *Keller* v. *Williams*, 49 Ind. 504; *Cooper* v. *Drouillard*, 5 Blackf. 152.

The next objection made to the first paragraph of the complaint is, that the insolvency of Justin C. Simpkins is not shown. The averment is that "he has not now, nor has he since said note was executed had, any property subject to execution more than the exemption allowed by law." This was sufficient. If he had no property except such as was

exempt by law, he had none subject to execution within the meaning of the law. It is true that a debtor may allow property exempt from execution to be levied upon and sold, but we think that property which may be taken upon execution, not by permission of the debtor, but in spite of him and by force of the law, is alone exempt from execution within the spirit of the law. This is the rule in an action between an endorsee and an endorser, and we think the same rule pertains in actions of this kind. *Campbell* v. *Gould*, 17 Ind. 133; *Dick* v. *Hitt*, 82 Ind. 92.

The same fact was averred, substantially the same way, in the second paragraph of the complaint, as to both makers of the note, and for the reasons given we think such averment was sufficient.

It is also insisted that as both notes were not due, the second paragraph of the complaint was insufficient. We think otherwise. If one was due and unpaid, as averred, a good cause of action was stated.

This disposes of all the objections made to each paragraph of the complaint.

The motion for a new trial embraced several reasons. Of these in the order discussed by appellant's counsel.

The endorsements upon the notes were not read in evidence, and the appellant insists that it was, therefore, insufficient. The appellant denied nothing in her answer but the fraud imputed to her, and as her failure to deny that the endorsements were made as averred operated as an admission of such averment, it was unnecessary to prove it. R. S. 1881, section 383.

The court instructed the jury, in substance, that if the appellant's husband conveyed the property in question to her for the purpose of defrauding his creditors, and she accepted it for such purpose, such conveyance was fraudulent and void as against such creditors. This, the appellant insists, was erroneous, without a modification saying the debtor must have no other property subject to execution. We agree with the appellant that the above charge is, as an abstract proposition,

not a correct statement of the law, but as applicable to this case it states the law correctly. The appellant admitted upon the trial that the makers of said notes at the time said conveyance was made did not have, nor has either of them since had, any property subject to execution, and under such circumstances, if the conveyance was made and accepted for the purpose of defrauding the grantor's creditors, such conveyance was fraudulent and void as against such creditors.

The court instructed the jury that if the appellant's father gave her forty acres of land, which he conveyed to her husband, and with the proceeds of which the land in controversy was purchased; that if she never released her right to the money, her husband might lawfully convey the same to her in payment of such claim.

She also claims that $300 of other money was invested in the land, and that the court, in not adverting to such claim in the above instruction, erroneously assumed that the former was her only claim. There is nothing, in our judgment, in this criticism. If the appellant desired the attention of the jury called to this particular item, she should have prepared, and requested the proper instruction to have been given.

The appellant asked the court to instruct the jury that, if she and her husband agreed that the forty acres of land claimed to have been given her by her father should be sold and the proceeds invested in land belonging to Allen D. Beasly for her, and, in pursuance of such agreement, she joined in the conveyance of such land, that the proceeds were invested in lands belonging to Allen D. Beasly, and the title thereto taken in the name of her husband, without her consent, he thereafter held such land in trust for her.

This was refused, and there was no error in its refusal. The land purchased from Allen D. Beasly is not the land in dispute, and it is immaterial how it was held, unless this fact is, in some way, connected with this land. The instruction does not, and though it was correct as an abstract proposition, its refusal did no injury. Besides, the instruction al-

ready noticed stated the law upon this question very favorably for the appellant.

The appellant called a witness, by whom she proposed to prove that her father had stated to said witness, before making the deed to the husband, that he intended to give her forty acres of the land, and after making the deed had stated that he had given her the land. These statements were, as it seems to us, mere hearsay, and were not admissible in evidence against the appellant.

The land conveyed by the father to the husband was sold in 1855, and the husband then purchased of Allen D. Beasly 160 acres of land in Warren county, took the title in his own name, lived upon and improved it till 1863, when he sold it, and purchased the land in dispute. The title to this was taken in his name; he built a fine house upon it, improved, and lived upon it until June, 1881, when he conveyed it to the appellant. He was at this time involved, and in view of the evidence as to the alleged consideration for this conveyance, we can not disturb the verdict of the jury.

This disposes of all the questions in the record, and as no error appears, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby approved at the appellant's costs.

Filed March 14, 1884.

No. 10,835.

94 474
127 238

94 474
146 662

94 474
158 623

THE CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY *v.* EATON.

RAILROADS.—*Evidence.*—*Damages.*—*Tort.*—In an action sounding in tort, by a passenger against a railroad company, for carrying her beyond her place of destination, there being evidence of failure to stop the train at the place, that she was landed where no conveyance could be procured, and that she then walked, in the night, a distance of five miles, she was

not allowed to prove further that the walk occupied three hours over dusty roads, that in crossing a creek she got her clothing and feet wet, that she was chased by dogs, and otherwise frightened, and that the weather was hot and sultry, in consequence of which she became and remained sick for some time.

Held, that the evidence was admissible.

SAME.—For a discussion as to what may be considered in assessing damages in such cases, see opinion.

From the Superior Court of Marion County.

A. C. Harris, W. H. Calkins and *R. B. Marshall*, for appellant.

I. M. Krutz, J. S. Duncan, C. W. Smith and *J. R. Wilson*, for appellee.

NIBLACK, J.—On the afternoon of the 12th day of July, 1881, Mrs. Mary M. Eaton purchased of the proper agent at the Union Depot, at Indianapolis, a ticket entitling her to transportation over the railroad belonging to and operated by the Cincinnati, Hamilton and Indianapolis Railroad Company, from that depot to Morehouse, a flag station a few miles east of Indianapolis, and soon thereafter, that is to say, on the same afternoon, entered a train of that company's cars which stopped regularly at Morehouse when signaled to do so. Her place of ultimate destination was the house of a brother-in-law, named Graham, who lived three miles south of Morehouse, and she expected Graham to meet her at Morehouse upon her arrival at the place. After leaving Indianapolis the conductor took up her ticket, but, for some unexplained reason, failed to signal the engineer to stop at Morehouse, and in consequence the train did not stop at that station.

When Mrs. Eaton discovered that the train was passing Morehouse without stopping, she appealed to a gentleman sitting near her for assistance, and requested him, if possible, to have the train stopped at the approaching crossing of a dirt road, saying that she would be willing to get off at that place. That gentleman went forward and soon returned with

a brakeman running on the train, who informed Mrs. Eaton that the train could not be stopped between stations as she had requested, but that they, meaning those in charge of the train, would take her on, free of charge, to Rushville, where they would meet another train, upon which they could send her back to Morehouse, thus enabling her to reach that place on her return at or near eleven o'clock that night. She declined to be set down at Morehouse at that time of night, and hence rejected the offer to be sent further on and returned in that way. As the train was approaching the next station, which was a small and unimportant station, five miles east of Morehouse, called Julietta, the conductor came to Mrs. Eaton and, taking her satchel, told her that she would have to get off there, where she would find a buggy ready to take her back to Morehouse. When the train stopped at Julietta, she followed the conductor out onto the platform, where he left her in charge of the station agent. After the train had left, she ascertained, upon inquiry, that no conveyance had been provided for sending her back to Morehouse, and that no conveyance could be procured for that or any similar purpose, at or near Julietta Station. Wishing, in any event, to proceed directly to the house of Graham, her brother-in-law, which was five miles distant across the country from Julietta, and not to return immediately to Morehouse, she left the station at which she had been so left on foot and walked the entire distance to Graham's house, leaving the former place perhaps before seven o'clock in the evening, and arriving at the latter place at nine o'clock at night.

This action was prosecuted by Mrs. Eaton against the railroad company to recover damages for being carried beyond Morehouse, and being compelled to walk so great a distance to reach Graham's house. After evidence had been introduced at the trial at special term, establishing, or tending to establish, the facts herein above stated, the plaintiff offered to prove: *First.* That the weather was hot and sultry during the afternoon and evening of the 12th day of July, 1881.

Secondly. That it took her nearly, or quite, three hours to walk from Julietta to Graham's house. *Thirdly.* That the road she had to walk over was very dusty. *Fourthly.* That in walking from Julietta to Graham's house she had to cross a creek at one place and a bayou at another place. *Fifthly.* That in crossing the creek, by the only practical method which the situation afforded, she got her clothing and feet wet, and that in crossing the bayou she had to carry rails and make a temporary walk way, suffering there, also, further injuries from mud and water. *Sixthly.* That a part of the road passed through a dark strip of woods. *Seventhly.* That she was sick when she arrived at Graham's house, and so continued for several days immediately thereafter. *Eighthly.* That her sickness resulted from the labor of walking, supplemented by worry of mind, fright, and the hot weather. *Ninthly.* That in passing a house on the road to Graham's house she was attacked and chased by two dogs, and in that way badly frightened. But the court refused to permit the plaintiff to make proof of the facts thus severally proposed to be proven, and the various rulings upon the exclusion of these facts were afterwards assigned as a cause for a new trial.

The trial at special term resulted in a verdict and judgment for the defendant. Upon an appeal to the general term the judgment at special term was reversed, the court holding that the judge at special term had ruled correctly in excluding the offered evidence as to the plaintiff's injuries from crossing the creek and bayou, as to her being attacked and chased by dogs, and as to her sickness claimed to have resulted from the incidents of her journey from Julietta to the house of her brother-in-law, but had erred in the exclusion of all the other items of rejected evidence, and it is from that judgment of reversal that this appeal is prosecuted.

The question as to what may be taken into consideration in the assessment of damages in a case like this is one which has provoked much discussion, and concerning which the text-writers have been unable to formulate any general rule of

easy application in all cases of the class to which this belongs. As bearing on the general subject there are many conflicting decisions, and in some cases sharp differences have been manifested between judges of the same court as to the conclusions which have been reached by a majority of their number.

A narrower limit is applied in the assessment of damages for a breach of contract, pure and simple, than is prescribed in an action for a tort, and, in our judgment, much of the conflict between decided cases and the individual views of judges, to which we have referred, has resulted from a failure to carefully observe that distinction between the two classes of damages. Two of the cases cited by counsel will serve to illustrate our meaning in this respect. One is the case of *Hobbs* v. *London, etc., R. W. Co.*, 11 Moak Eng. R.181, and the other is *Pullman Palace Car Co.* v. *Barker*, 4 Col. 344 (34 Am. R. 89). These cases were both treated as, and decided upon the theory that they were, actions for a breach of contract merely, when in truth they were both actions for a neglect of duty by a common carrier from which an injury resulted to a passenger, and hence were, in all their essential features, actions for tortious misconduct on the part of the defendants.

Counsel for the appellant contend for the application of the doctrine of these and other kindred cases to the case at bar, upon the like theory that it is only an action for the breach of a contract for transportation, entered into between the parties, and, consequently, an action in which the narrower limit ought to be applied in the assessment of the damages. It is true that the appellee entered the appellant's train of cars at Indianapolis, under an implied contract for her transportation to Morehouse, but when the appellant carried the appellee beyond Morehouse, against her will, it ceased to carry her as a passenger for hire, and became a wrong-doer, responsible for whatever injury or inconvenience, if any, which might result to her from being thus carried beyond her place of destination.

Thompson on Carriers of Passengers, p. 568, says: "The

refusal of the carrier to receive a passenger, carrying him beyond his destination, detaining him unnecessarily during his journey, or carrying off a person against his will who is legitimately upon a vessel, are all wrongs which may be redressed by actions for damages thereby sustained." And this statement of general legal propositions is well supported in reason, as well as by the authorities cited by the author. Therefore, the essential facts relied upon for a recovery in this action constituted a tort, concerning which a wider range of inquiry was permissible than in an ordinary action for the simple breach of a contract. *Heirn* v. *McCaughan*, 32 Miss. 17; *The Canadian*, 1 Brown Adm. R. 11; *Stoneseifer* v. *Sheble*, 31 Mo. 243; *Thompson* v. *New Orleans, etc., R. R. Co.*, 50 Miss. 315 (9 Am. R. 443); *Burnham* v. *Grand Trunk R. W. Co.*, 63 Me. 298 (18 Am. R. 220).

Thompson on Negligence lays down the following general rule on the subject of consequential damages: "Whoever does a wrongful act is answerable, for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrong-doer." 2 Thomp. Neg. 1084; Add. Torts, 5; *Baltimore, etc., R. R. Co.* v. *Reaney*, 42 Md. 117.

In the case of *Jones* v. *Boyce*, 1 Stark. 402, Lord ELLENBOROUGH said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The case of *Brown* v. *Chicago, etc., R. W. Co.*, 54 Wis. 342 (41 Am. R. 41), the facts, briefly stated, were that Brown and wife, and a seven year old child, took passage on the railway to a place called Manston; that before reaching Manston, and at a place three miles east of that place, Brown and wife were told by a brakeman that they were then at Manston, and to leave the train, which they accordingly did; that it was then night; that it had rained the day before, and

was still cloudy; that, ascertaining that they were not at Manston, and seeing no house at which they could take shelter, Brown, with his wife and child, walked on in the direction of Manston, arriving there late at night; that Mrs. Brown was, at the time, *enciente*, and was very much exhausted by the walk; that she soon afterward became dangerously sick, and had a miscarriage, all resulting from the exertion she had made in walking. After an elaborate review of numerous authorities having a bearing on the question involved, including the cases of *Hobbs* v. *London, etc., R. W. Co., supra*, and *Pullman Palace Car Co.* v. *Barker, supra*, which were disapproved, the court held that the railway company was liable to Mrs. Brown for the injuries she received from her enforced walk to Manston.

That case was, perhaps, a stronger one against the railway company, in some respects, than the one at bar, but the general principles announced, as decisive of that case, have a practical application to the facts of this case, and are entitled, as we believe, to the favorable consideration of this court.

The court in that case, after referring to what had been announced as a correct legal proposition in another case, continued: "So, in the case at bar, the defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and, acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury. Such injury can be, and is, traced directly to the defendant's negligence as its cause; and it is its proximate cause, within the rules of law upon that subject."

It is due, however, to the importance of the subject to state that the opinion in that case was promulgated by a majority vote only, two of the judges dissenting, and for that reason we would not quote from it with approbation if we were not fully satisfied that the conclusion reached was substantially a correct conclusion upon the facts as we find them reported. The case is, at all events, one of interest because of its grouping

together of, and its comments upon, a great number of cases having relation to the general subject of the liability of common carriers of passengers.

When the appellant set the appellee down at Julietta, it did so at the peril of having to respond in damages for whatever injury, if any, she had already sustained, or might thereafter sustain, by being carried out of her way on the journey she started out to make, and placed her in a position in which she was required to do whatever was necessary to extricate herself from the consequences of the wrong which had been inflicted upon her.

If, therefore, without being able to procure a conveyance, and acting with prudence and care, the appellee proceeded on foot to complete her journey, and thereby, and as incidental thereto, received injuries, and incurred vexatious annoyances, she became entitled to have those injuries and annoyances taken into consideration in estimating her damages in the event of a verdict in her favor.

Some of the facts which the appellee proposed, but was not permitted to prove, might not have been of much value as evidence, but, as incidents connected with the appellee's journey, they were all facts which, we think, ought to have been admitted in evidence for the consideration of the jury. If the dogs which attacked and chased the appellee had bitten or otherwise physically injured her while on her way, that would doubtless have constituted a distinct and disconnected injury, for which the appellant would not have been responsible, but the fright and peril, which she proposed to prove were occasioned by the dogs, amounted only to annoyances incidental to the walk which, it is assumed, the appellee was constrained to make, and hence stand upon different grounds.

The conclusion we have reached in this case is supported, either directly or indirectly, by the following cases: *Billman* v. *Indianapolis, etc., R. R. Co.*, 76 Ind. 166 (40 Am. R. 230); *Binford* v. *Johnston*, 82 Ind. 426 (42 Am. R. 508); *Williams* v. *Vanderbilt*, 28 N. Y. 217; *Eten* v. *Luyster*, 60 N. Y. 252;

Allison v. *Chandler*, 11 Mich. 542; *Hill* v. *Winsor*, 118 Mass. 251; *Lake Erie, etc., R. W. Co.* v. *Fix*, 88 Ind. 381 (45 Am. R. 464).

The judgment of the court below at general term is affirmed, with costs.

Filed April 15, 1884.

No. 11,160.

FRAZER, TRUSTEE, *v.* CLIFFORD ET AL.

MARRIED WOMAN.—*Power to Mortgage her Real Estate.—Security for Debt or Liability.—Law Prior to May 31st, 1879.*—Under the law of this State, as it existed prior to May 31st, 1879, when "An act concerning married women," approved March 25th, 1879, took effect, a married woman had full power, her husband joining with her, to execute a valid mortgage on her separate lands, howsoever acquired by her, to secure the debt or liability of her husband.

SAME.—*Effect of Act of March 25th, 1879.—Repeal by Implication.*—The act of March 25th, 1879, concerning married women, contained no repealing clause or section, but it repealed by necessary implication so much, and only so much, of the previously existing law as was inconsistent or in conflict with the provisions of the later act. Thus, while the later act deprived a married woman of all power "to mortgage or in any manner encumber her separate property, *acquired by descent, devise or gift*," it did not limit or restrain her power to mortgage or encumber her separate property, *acquired by contract or purchase*, as it existed before such act took effect.

SAME.—*When Mortgage Valid.*—A mortgage given by a married woman and her husband on her separate real estate, acquired by her contract or purchase, to secure the debt of her husband, after the act of March 25th, 1879, concerning married women, took effect, and while it remained in force, is a valid and binding mortgage.

From the Hamilton Circuit Court.

H. J. Milligan, for appellant.

T. J. Kane and *T. P. Davis*, for appellees.

HOWK, C. J.—The issues joined in this cause were submitted to the court for trial; and at the request of the appellant, the plaintiff below, the court made a special finding

of facts, and stated its conclusions of law thereon. The appellant excepted to the court's conclusions of law, and judgment was rendered in accordance therewith.

The only error assigned by the appellant, in this court, is that the trial court erred in its conclusions of law upon the facts specially found.

The special finding of facts was, in substance, as follows:

"On the 4th day of January, 1880, the defendant Matilda A. Clifford and Luther O. Clifford executed to the Franklin Life Insurance Company, a corporation organized and existing under the laws of Indiana, their note set out in the complaint, whereby they promised to pay said insurance company the sum of $500, with five per cent. attorneys' fees, payable without relief from valuation or appraisement laws, with interest at eight per cent. per annum from date, payable semi-annually; and at the same time, and as part of the same transaction, said Matilda A. Clifford and Luther O. Clifford executed to said insurance company their mortgage set out in the complaint, whereby they conveyed to said insurance company the following real estate, in Hamilton county, Indiana, to wit: Eighty acres off of the south side of the northwest quarter of section 6, township 19 north, of range 5, to secure the payment of said note. It was provided in said mortgage, that 'in default of payment of interest when due, the principal sum shall become due.' The interest on the note was paid June 10th, 1881, but there was no payment of interest maturing after that date. On the 4th day of August, 1881, on the 4th day of February, 1882, and on the 4th day of August, 1882, defaults were made in the payment of interest, and no part of the principal was at any time paid. On the 6th day of May, 1882, the Franklin Life Insurance Company, being in embarrassed and failing circumstances, in pursuance of the statutes of this State providing for voluntary assignments for the benefit of creditors, made a general assignment of all its property to James S. Frazer, in trust for all its *bona fide* creditors, which assignment was, on the 6th

day of May, 1882, duly entered of record in the recorder's office of Marion county, Indiana, where the home office of said insurance company was at that time, and said James S. Frazer at once entered upon the duties of his trust, and has been ever since so acting. The note aforesaid was the evidence of a loan of $500 on that day made to said Matilda A. and Luther O. Clifford. The $500 thereby represented was the cancellation of the note of $350 of said Luther O. Clifford, due to and held by said insurance company, and $150 taken by said Matilda A. Clifford and by her expended in the improvement of the real estate described in said mortgage, for which purpose such sum was borrowed at the date of said $500 note and mortgage. The said Matilda was the wife of her co-defendant, and he then was, and for one year prior thereto had been, indebted to the mortgagee in the sum of $350, for which sum the mortgagee then held his note; and the only consideration for the execution of the $500 note and mortgage was the payment of said $150 cash to said Matilda and the surrender to Luther O. Clifford and cancellation of his $350 note. The $500 note was taken by the mortgagee in sole reliance upon the mortgage as security, said L. O. Clifford being then and there insolvent.

"At the date of said mortgage said Matilda A. Clifford was the owner in her own right of the real estate described therein, and, with her husband, was living on and operating the same, and her title came to her in the following way: On the — day of ——, 1859, Cary W. Harrison, the father of said Matilda A. Clifford, conveyed to her, by good and sufficient deed, the following real estate in Hamilton county, Indiana, to wit: The undivided two-thirds part of fifty acres off of the north end of the west half of the northeast quarter of section 30, township 19, range 5. Said conveyance was an advancement by said Cary W. to his daughter, and was purely a gift. Said Matilda A. went into full possession of said real estate, and was the owner of the same free of the claim of any person. On the 3d day of August, 1861, said Cary W. Harrison con-

veyed to his son John J. Harrison the following real estate in Hamilton county, Indiana, to wit: The south half of the northwest quarter of section 6, in township 19 north, of range 5 east, which conveyance was an advancement and gift by said Cary W. to John J. Harrison, the brother of said Matilda A. Clifford. Said John J. Harrison went into possession of said real estate, and was the full and perfect owner thereof. At the dates of these conveyances said Cary W. Harrison was a widower, but he afterwards intermarried, and desired to have the land he had conveyed to said Matilda A. Clifford, to wit, the two-thirds part of fifty acres aforesaid, for a residence. He then proposed to said Matilda A. Clifford, if she would convey to him the real estate aforesaid which he had conveyed to her, he would cause his son John J. Harrison to convey to her the south half of the northwest quarter of section 6, township 19, range 5 east, in Hamilton county, Indiana.

"In order to induce her to make such conveyance and exchange of property, he offered to give her personal property of the value of $200. Matilda A. Clifford accepted these terms, and, in compliance therewith, conveyed, her husband joining with her, the two-thirds of fifty acres aforesaid, theretofore given to her by her father, back to him; and at the same time, and as part of the same transaction, he, said Cary W. Harrison, caused said John J. Harrison to convey the following real estate to her, said Matilda, to wit: The south half of the nothwest quarter of section 6, township 19, range 5, in Hamilton county, Indiana, and, in addition thereto, said Cary W. Harrison gave said Matilda $200 worth of personal property for making said conveyance. In order to induce said John J. Harrison to make said conveyance to said Matilda, said Cary W. Harrison conveyed to him the following real estate in Hamilton county, Indiana, to wit, sixty acres of land. Afterwards, to wit, February 7th, 1865, it appearing that the south half of the northwest quarter of section 6, township 19, range 5 aforesaid, contained more than eighty

acres (the parties having supposed theretofore that it contained only eighty acres), at the request of said John J. Harrison, and in consideration of his promise to convey to her eighty acres off of the south side of the northwest quarter of section 6, township 19, range 5 east, in Hamilton county, Indiana, and the further consideration of $100 by said John J. Harrison paid to her, said Matilda A. Clifford, her husband joining in the deed, conveyed the south half of the northwest quarter of section 6, township 19, range 5 aforesaid, to said John J. Harrison, and said John J. Harrison thereupon conveyed to said Matilda A. Clifford eighty acres off of the south side of the northwest quarter of section 6, township 19, range 5 aforesaid, as he had agreed to do. Said last named real estate is the same conveyed in the mortgage set out in the complaint."

Upon the foregoing facts the court stated its conclusions of law as follows:

"1st. That defendants Matilda A. Clifford and Luther O. Clifford are jointly and severally indebted to plaintiff in the sum of one hundred and fifty dollars, with interest at eight per cent., from June 10th, 1881, and five per cent. attorneys' fees, amounting in all to one hundred and eighty-one and $\frac{65}{100}$ dollars, payable without any relief whatever from valuation or appraisement laws.

"2d. That Luther O. Clifford is indebted to plaintiff in the sum of three hundred and fifty dollars, with eight per cent. interest, from June 10th, 1881, and five per cent. attorneys' fees, amounting to four hundred and seventy-six and $\frac{35}{100}$ dollars, payable without relief from valuation or appraisement laws.

"3d. The plaintiff's mortgage described in the complaint, is a lien for said one hundred and fifty dollars, interest and attorneys' fees, amounting to one hundred and eighty-one and $\frac{65}{100}$ dollars.

"4th. The mortgaged real estate came to Matilda A. Clifford by a gift from her father.

"5th. Said mortgage is not a lien for said three hundred and fifty dollars, interest and attorneys' fees, due from Luther O. Clifford."

Did the trial court err in its conclusions of law? If the court was right in its *fourth* conclusion of law, it was right also in its *fifth* legal conclusion. When the note and mortgage in suit were executed, "An act concerning married women," approved March 25th, 1879, which took effect on the 31st day of May, 1879, was in force as a law of this State. In section 10 of this act it was provided as follows:

"A married woman shall not mortgage or in any manner encumber her separate property acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person." Acts 1879, p. 161.

This section remained in force at least until the 19th day of September, 1881, when it was, perhaps, superseded or repealed by implication by the broader and more comprehensive provisions of section 4 of the act of April 16th, 1881, concerning husband and wife. Section 18 of this latter act provides that "All laws and parts of laws within the purview of this act, or (and) inconsistent therewith, are hereby repealed." Acts 1881, p. 531. In section 4 of this latter act (section 5119, R. S. 1881) it is provided as follows: "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

Prior to the taking effect of the act of March 25th, 1879, concerning married women, on the 31st day of May, 1879, the law of this State, in relation to the right and power of a married woman to encumber her own separate real property, was contained in section 5 of "An act touching the marriage relation and liabilities incident thereto," approved May 31st, 1852. This section 5 provided as follows: "No lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried: *Provided*, That

such wife shall have no power to incumber or convey such lands, except by deed, in which her husband shall join." 1 R. S. 1876, p. 550.

Under and by virtue of the power conferred upon a married woman by this section of the statute, it was repeatedly held by this court, that she and her husband might execute a valid mortgage on her separate lands to secure the debt of her husband. *Hubble* v. *Wright*, 23 Ind. 322; *Ellis* v. *Kenyon*, 25 Ind. 134; *Philbrooks* v. *McEwen*, 29 Ind. 347; *Hasheagen* v. *Specker*, 36 Ind. 413; *Brick* v. *Scott*, 47 Ind. 299; *Layman* v. *Shultz*, 60 Ind. 541; *Sperry* v. *Dickinson*, 82 Ind. 132; *Gregory* v. *Van Voorst*, 85 Ind. 108.

The act of March 25th, 1879, concerning married women, contained no repealing clause or section. In *Haas* v. *Shaw*, 91 Ind. 384, in speaking of this act, it was said: "While the provisions of the act must be liberally construed, according to their true intent and meaning, yet, * * * they are not to be enlarged by construction beyond the plain meaning of the language used by the law-making power in their enactment." The general purpose and intention of the act, no doubt, was the emancipation of married women from their legal disabilities, or some of them, to the extent specified in the act, and no farther. While this is so, it will be observed that, in section 10 of the act above quoted, the power of a married woman to encumber her separate real property, as it had theretofore existed in this State, was limited and restricted, rather than enlarged. This section 10 repealed by implication so much, and only so much, of section 5, above quoted, of the above entitled act of May 31st, 1852, as was inconsistent or in conflict with the provisions of the later section. Thus, while section 10 above quoted absolutely deprived a married woman of all power to encumber in any manner her separate property acquired by descent, devise or gift, it was wholly silent in regard to her separate property, acquired by her contract or purchase. It must be held therefore, as it seems to us, that after the aforesaid act of March

25th, 1879, took effect, and while it remained in force, a married woman had the power, under the provisions of section 5 above quoted, to encumber her separate real property, acquired by her contract or purchase, by her mortgage, in the execution of which her husband joined, to secure her own or her husband's debts.

In the case at bar, we are of opinion that, upon the facts specially found by the court, its *fourth* conclusion of law above quoted was clearly erroneous; for, upon those facts, it must be held that the mortgaged real estate came to the appellee Matilda A. Clifford, by contract or purchase, and *not* by gift from her father. It follows, also, from what we have said, that the *fifth* conclusion of law above quoted was erroneous; for the mortgage in suit was, upon the facts specially found by the court, a valid security for the entire amount due upon the note in suit of principal, interest and attorneys' fees.

The judgment is reversed with costs, and the cause remanded with instructions to the court to set aside its conclusions of law, and, in lieu thereof, to state conclusions of law not inconsistent with this opinion, and render judgment accordingly.

Filed April 3, 1884.

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128 174

No. 10,703.

GARDNER *v.* THE STATE, EX REL. STOTTLER.

BASTARDY.—*Evidence.—Surprise.*—A party has no right to assume that testimony which is competent and legitimate under the issues will not be introduced, and hence a defendant in a bastardy proceeding can not claim surprise that the relator states acts of intercourse at places different from where he supposed, unless she led him to believe her testimony would be different.

SAME.—In such cases the defendant must be prepared to meet the case made by the relator, as he has the means of ascertaining her version of the matter.

NEW TRIAL.—*Newly Discovered Evidence.—Diligence.—Affidavit of Witness.*—The showing in support of a new trial, on the ground of newly discovered evidence, must show that diligence has been used, and the facts constituting the diligence must be stated. The affidavits of the witnesses by whom such facts can be established must accompany the showing.

SAME.—*Refusal of Witness to Make Affidavit.*—The refusal of the witness to make the affidavit is not sufficient, as the court, upon application, will compel the witness to make the affidavit.

From the Hamilton Circuit Court.

D. Moss, T. J. Kane, R. R. Stephenson, T. P. Davis, W. H. Craig and *L. O. Clifford*, for appellant.

W. Neal and *J. F. Neal*, for appellee.

BEST, C.—This was a prosecution for bastardy. The cause was tried and a judgment rendered against the appellant. A motion for a new trial was overruled, and this ruling is assigned as error.

The principal ground for the motion was newly discovered evidence. The relatrix testified to several acts of sexual intercourse with the appellant, one in January, another in February and others in April, preceding the birth of the child, which occurred on the 5th day of October, 1882. The relatrix stated that the one in January occurred in the evening upon the roadside near school house No. 10, while she was on her way there to attend a spelling school, and the one in February occurred while she was passing through a strip of woods upon appellant's farm. The appellant produced the affidavit of Victoria Carson, who states that she was with the relatrix while passing through the woods upon appellant's farm at the time mentioned, and that the relatrix did not see the appellant upon that occasion. He also produced the affidavits of John Greer and Edward Kepner, who stated that they accompanied the relatrix from near her home to the spelling school at the time named, and that she did not see the appellant upon that occasion. The appellant also filed his own affidavit, in which he states that "he did not know until he heard the testimony of the relatrix on the trial of

said cause, that she claimed to have had sexual intercourse with him at either of the times and places fixed by her in January and February, 1882, and had no information or knowledge to that effect; that her testimony on said trial was the first intimation he ever had that she claimed to have had sexual intercourse with him near said school house in January, or in the woods in February; that he was surprised on said trial in this court by her said testimony, as he had been informed and believed, prior to said trial, that she claimed to have had the intercourse with him at his house, and at no other place, and, therefore, that he was not prepared to refute her statements with witnesses, aside from his own testimony on the trial; * * * that he used every effort, prior to said trial, to discover all important and material testimony in his behalf; that he went to see and inquire of each and every person whom he knew or believed had any knowledge of the matters involved or knew any facts that he was advised or supposed were material to his defence." The affidavit of appellant states other facts which will hereafter be noticed, but makes no other statement tending to show diligence in the discovery of this testimony, and in this respect we are of opinion that the showing was insufficient. The statement of appellant, that he was surprised at the testimony of the relatrix that acts of intercourse had occurred at places other than at his home, adds nothing to the showing. This testimony was competent and legitimate under the issues, and in such case a party has no right to assume that no such testimony will be introduced. *Pauley* v. *Short*, 41 Ind. 180; *Hill* v. *Sutton*, 47 Ind. 592; *Chamberlain* v. *Reid*, 49 Ind. 332.

It would be otherwise if the relatrix had led him to believe that no such testimony would be given. *Haynes* v. *State, ex rel.*, 45 Ind. 424.

The statement is that "he was informed and believed" that no such testimony would be given, but it is not stated that the relatrix informed him that such would be the case, or made such statement to any other person. In the absence of such

information from the relatrix, the appellant was required to anticipate any testimony admissible under the issues, and to be prepared to meet it. In cases of this kind the procedure itself furnishes the defendant with ample means to avoid surprises of this kind. The relatrix is examined as a witness before the justice, and upon such examination the defendant can ascertain from her when, where, and under what circumstances the child was or may have been begotten. In this case the appellant did not avail himself of this opportunity to ascertain her version of the facts, but waived an examination, and now he can not say that he was surprised at her testimony, simply because he did not know what it would be. The application for a new trial is not on the ground of surprise; but this is stated, as we suppose, as an excuse for not using any diligence to obtain the newly discovered evidence before the trial. If we are right in the conclusion that the facts stated show no surprise, then it follows that no diligence was used to obtain this testimony, as the inquiries made by him must have had no reference to facts which he did not believe was material to his defence. Again, the facts which constituted the diligence must be stated, so that the court can determine whether or not diligence was, in fact, used. This is not done. The statement made is nothing more than a general statement that due diligence was used, which is insufficient. *Rickart* v. *Davis*, 42 Ind. 164; *Reno* v. *Robertson*, 48 Ind. 106.

The appellant's affidavit also stated that John Zelt and Conrad Eck, after the trial, first informed him that Charles Lockwood accompanied the relatrix home from said spelling-school, and that in going home they were alone, went nearly two miles out of the usual way; that they left the road, crossed a field in the direction of a straw stack, and were not seen after they reached its vicinity; that the parties decline to make an affidavit of these facts, and so does said Lockwood; that appellant believes said Lockwood had sexual intercourse with the relatrix about the time the child was begotten,

and that he can prove it upon another trial; that he was ignorant of these facts until after the trial, etc.

The showing made upon the ground that Lockwood had had sexual intercourse with the relatrix at this time was not sufficient, because the affidavits of the witnesses did not accompany the application. This is required, unless a sufficient excuse is shown for the failure to file them. *Shipman* v. *State*, 38 Ind. 549; *Hill* v. *Roach*, 72 Ind. 57.

The refusal of the witness to make the affidavit is not a sufficient excuse, as the court, upon application, will compel the witness to make the affidavit. *Rater* v. *State*, 49 Ind. 507.

For these reasons, we are of opinion, that the showing for a new trial upon the ground of newly discovered evidence was insufficient.

The other reasons assigned for a new trial are not urged, and the ruling upon the motion can not be disturbed. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment is hereby in all things affirmed, at the appellant's costs.

Filed March 27, 1884.

No. 11,437.

THE STATE, EX REL. PADGETT, PROSECUTING ATTORNEY, *v.* FOULKES ET AL.

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124 590
94 488
131 401
133 109
94 493
150 308

QUO WARRANTO.—*Information against Incorporators of Railway Company.—Contradictory Averments.—Pleading.*—Where an information, in the nature of a *quo warranto*, against the incorporators of a railroad company, sets out several alleged illegal acts in the same paragraph, these several acts must be construed, not as separate paragraphs, but as parts of one paragraph; and if the allegations contradict each other as to material facts, the paragraph is bad.

SAME.—*Illegal Act of Secretary of State.*—The fact that the Secretary of State, in filing the articles of such company, unlawfully antedates them, is not ground for such information.

SAME.—*Filing Articles of Association.*—In filing such articles, it is the act of depositing them in such secretary's office, and not the mere file-mark thereon, that constitutes the filing.

SAME.—*Residences of Subscribers.*—Such articles need not state the residences of the subscribers.

From the Knox Circuit Court.

A. J. Padgett, H. S. Cauthorn, J. M. Boyle and *O. F. Baker*, for appellant.

W. H. De Wolf, S. N. Chambers, F. W. Viehe, R. G. Evans, G. G. Reily, W. C. Niblack and *J. C. Denny*, for appellees.

ELLIOTT, J.—It has long been settled that where an amended complaint is filed the original no longer remains as a pleading, and that rulings upon it are made immaterial by the amendment. The record in this case shows that the ruling on the motion to strike out applied solely to the original complaint, and as that was superseded by amendment, that ruling becomes wholly immaterial. The only ruling in the case, therefore, which is properly before us is that upon the demurrer to the information, and to that we direct our attention.

The information is one in a proceeding in the nature of a *quo warranto*, and charges that the appellees have assumed to create a corporation under the name of the Vincennes and Ohio River Railroad Company, have assumed to exercise corporate powers, and claim that the pretended corporation was organized under the general laws providing for the incorporation of railroad companies.

The first specification in the information charges that a public meeting was held in the city of Vincennes, on the 6th of February, 1883, for the purpose of organizing the corporation; that a draft of articles of association was then presented and signatures called for; that the name of the corporation was not stated, nor was the amount of the capital stock, nor the termini of the railroad given; that the draft of the articles was, at that meeting, blank as to these matters; that it was agreed that such blanks should not then be filled

but should afterwards be filled; that, with this understanding, divers persons signed the instrument; that at a subsequent meeting the blanks in the instrument were filled without the knowledge or consent of those who had signed at the previous meeting, and that other persons then signed, but the entire capital stock purporting to have been taken was only $50,150, and there was no ratification by those who had previously signed; that the instrument was then filed. It is also averred that the articles had not the amount of stock subscribed required by law; that the persons named as directors were not stockholders. The substance of the second specification is that defective articles of association were filed with the secretary of state, on the 3d day of March, 1883 (but wherein they were defective is not stated), and that in July following other articles of association were filed, purporting to be original articles of association, and that the date of filing was not truly stated, but was given as the 3d of March, 1883, whereas they were filed in July or August. The third specification charges that the articles were never filed. The fourth specification charges that stock to the amount of $50,000 had not been subscribed when the articles of association were filed; that no directors were elected, and that the subscribers did not state their respective places of residence or the shares of stock subscribed respectively. It is charged in the fifth specification that the subscriptions to the capital stock of the corporation were not made in good faith, but that those who did subscribe the articles in good faith, not being able to secure the requisite amount, the amount of $47,000 was subscribed by John R. Long, a non-resident of the State and wholly insolvent; that Long made his subscription solely for the purpose of enabling the appellees to incorporate, and that they did not intend to rely upon the subscriptions to the capital stock of the alleged corporation, but upon appropriations from public corporations along the line of the proposed railroad.

The charges of the first specification are nullified by those

of the second. The statements of the latter specification show that two articles of association were executed and filed, and if the last was properly executed, and this is not denied, and filed, then the improper or defective execution of the first is not material. The question is not whether the first articles were properly executed, but whether such steps had been taken as entitled the association to exercise corporate powers, at the time the information was filed. If there was a legal corporation at that time, then, no matter how many mistakes had occurred prior to that time, or how great the irregularities in the preparation of the articles of association, the relator has no right to maintain this information.

The allegation that the secretary of state antedated the filing of the articles of association does not make this specification good. If that officer had violated his duty in that respect, still the legality of the acts of the corporators would not be injuriously affected. The State can not take rights from a corporation because of a wrong committed by one of its own officers. But, aside from this, the allegation is insufficient for another reason, for the endorsement of the date of filing is not the material thing, the act of depositing the paper with the proper officer is the essential element of the act of filing. *Naylor* v. *Moody*, 2 Blackf. 247; *Engleman* v. *State*, 2 Ind. 91; *Johnson* v. *Crawfordsville, etc., R. R. Co.*, 11 Ind. 280; *Miller* v. *O'Reilly*, 84 Ind. 168.

The appellant contends that the specifications, although set forth in one and the same paragraph, are separate and distinct causes of action, and that each is to be considered without reference to the others. We can not assent to this view. There is but one cause of action set forth in the pleading, and if that is a good one the complaint is sufficient; if not, the complaint is insufficient. If the statements of one part of a single paragraph of the complaint are shown to be untrue or to be of no force by another part, then the whole paragraph must fall. For example, if a complaint consisting of a single paragraph should aver in one place that articles of associa-

tion were not filed, and in another aver that they were filed, the complaint would necessarily be bad, for the conflict would leave no facts admitted by the demurrer; or, if a single paragraph shows facts constituting a *prima facie* cause of action, but adds to them facts constituting a perfect defence, the pleading would certainly be bad on demurrer. Thus, if an information against one claiming a public office should show that the claimant did not receive a majority of the votes cast, but should also show that his competitor, the relator, was ineligible, it would be bad. *State, ex rel.*, v. *Bieler*, 87 Ind. 320; *Reynolds* v. *State, ex rel.*, 61 Ind. 392. It is true that separate and distinct assignments of breaches of bonds, and in some cases separate specifications of causes for injunction, may be separately demurred to, but these are exceptional cases, and it may well be doubted whether the practice recognized as correct in such cases is not opposed to the spirit of the code; at all events, it is one not to be extended. Even in these exceptional cases it is held that the separate specifications are to be taken in connection with the other allegations; while in the case of separate and different paragraphs the rule has always been that each paragraph must be good and complete in itself, and that it can not be aided by statements in other paragraphs. It is perfectly clear, therefore, that if one specification is overthrown by another specification in the same paragraph, the whole paragraph, in so far as its counts upon the cause on which the specifications are flatly contradictory, is bad.

Another contradiction occurs between the allegations of the third and the second specifications as to the filing of articles of association, and for this reason we must disregard both. Where there are contradictory allegations, we must construe the pleading against the pleader, for upon him rests the burden of affirmatively stating a cause of action or defence, and if he annihilates one allegation by another, nothing is affirmed.

Between part of the allegations of the fourth and fifth

specifications, there is a direct contradiction, one affirming that stock to the amount of $50,000 was never subscribed; the other stating that it was subscribed, but that $47,000 of the amount was subscribed by an insolvent person. Here again one statement nullifies the other, and we can not act upon either.

It has been many times decided that a single paragraph of a complaint must proceed upon a definite theory and must be good upon that theory or not good at all. So, too, it has been decided that a pleading can not both affirm and deny the same thing. *Mescall* v. *Tully*, 91 Ind. 96; *Johnston* v. *Griest*, 85 Ind. 503; *Platter* v. *City of Seymour*, 86 Ind. 323; *Johnston, etc., Co.* v. *Bartley*, 81 Ind. 406; *Judy* v. *Gilbert*, 77 Ind. 96 (40 Am. R. 289); *Lockwood* v. *Quackenbush*, 83 N. Y. 607; *Salisbury* v. *Howe*, 87 N. Y. 128; *Cronk* v. *Cole*, 10 Ind. 485.

It is well settled that pleadings are to be construed, not from isolated statements, but according to their general scope. They can not be made good by detached statements, but must be so when taken as a whole, pursuant to the general tenor of their allegations. *Neidefer* v. *Chastain*, 71 Ind. 363, S. C., 36 Am. R. 198; *Kimble* v. *Christie*, 55 Ind. 140; *Trippe* v. *Huncheon*, 82 Ind. 307; *Jackson School Tp.* v. *Farlow*, 75 Ind. 118; *Richardson* v. *Snider*, 72 Ind. 425, S. C., 37 Am. R. 425. A pleader can not select detached statements and repudiate others, and then insist that his complaint is good. It is true that surplusage does not vitiate, but averments directly made, and fully bearing upon and blended with the material facts, can not be deemed surplusage. Stephen Pleading, 422.

It is an elementary principle that a demurrer admits only such facts as are sufficiently pleaded. *Platter* v. *City of Seymour*, 86 Ind. 323; *Peyton* v. *Kruger*, 77 Ind. 486; Gould Pl. (4th ed.) 439. Facts contradictorily pleaded are certainly not sufficiently pleaded, and if they are not then they are not admitted.

The object of pleading is to evolve an issue, that is, to reach a point where facts are affirmed on one side and denied on the other, and, therefore, an issue can never be reached if a plaintiff may both affirm and deny the same things.

It is also an elementary rule that the evidence must be confined to the allegations of the pleadings, and this would be impossible if a plaintiff were permitted, in one cause of action, to both affirm and deny the same thing. If he could do this, then he could prove the same thing and yet disprove it, so that there would be really nothing to which he could be confined. It is evident, therefore, that a contradictory pleading can not be good where the contradiction is upon matters of a material character, and takes place as to the same matters.

The allegations of the information admitted by the demurrer leave but one question undisposed of, and that is the question whether the failure to state the residences of the subscribers vitiated the articles of association. The statute does not require that the residences of subscribers to articles of association of railroad corporations should be stated, and, therefore, the failure to state them does not vitiate the articles signed and filed by the appellees. R. S. 1881, section 3885.

We agree with the appellant's counsel, that if the information contained one valid specification sufficiently pleaded, the demurrer should have been overruled, for we fully approve the rule that where a demurrer is addressed to an entire pleading, one sufficiently pleaded and good cause of action will repel the assault. But we find here no good cause sufficiently pleaded. Such causes as would be good if they had not been nullified by contradictory statements are, by these statements, utterly borne down and overthrown, leaving admitted only the allegations sufficiently pleaded.

Judgment affirmed.

NIBLACK, J., did not take any part in the decision of this cause.

Filed April 15, 1884.

No. 11,119.

KIOUS ET AL. *v.* DAY.

PRACTICE.—*Motion in Arrest of Judgment.—Complaint.*—A complaint upon an assigned partnership account, which does not state the consideration for the assignment, and does not aver a settlement of the partnership affairs, is sufficient upon a motion in arrest of judgment.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellants.

R. Gregory, for appellee.

FRANKLIN, C.—Appellee sued the appellant Kious on account, making appellant Hay a co-defendant to answer as to his interest in the account, alleging that appellee and Hay had been partners when the account was made; that the partnership had been dissolved, and that Hay had assigned by delivery to appellee all his interest in the account.

Issues were formed, and there was a trial by jury, verdict for plaintiff, and, over motions for a new trial and in arrest, judgment was rendered upon the verdict.

The only question presented to this court is upon the overruling of the motion in arrest of judgment.

The only objections made to the complaint are, that it does not show the consideration for the assignment of Hay's interest in the account to appellee, and does not aver a settlement of the partnership affairs. Appellant makes no argument upon these objections, nor does he cite any authority in favor of the position assumed. To be equally as brief in this opinion, we do not think that it was necessary for the complaint to show the consideration for the assignment, nor that the partnership matters had been finally settled. The complaint was certainly good as against these objections first made after verdict. This court does not favorably view objections thus made. A party who takes the risk and goes to trial without any objections to the complaint, after the result of the trial is against him, should not be heard to make any other

than very substantial objections to the complaint, under a motion in arrest of judgment. There was no error in overruling the motion in arrest.

The specification of error in overruling the motion for a new trial is waived by appellant, in his brief, only presenting the question of overruling the motion in arrest.

There is no error in the record, and we see no merits in the appeal. The judgment ought to be affirmed, with damages.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs and ten per cent. damages.

Filed March 4, 1884.

No. 11,257.

MATHES v. SHANK ET AL.

94 501
145 293

PROMISSORY NOTE.—*Endorsement by Married Woman.—Liability of Assignor.—Act of March 25th, 1879.—Construction of Statute.*—At common law, the assignment or endorsement of a promissory note, by a married woman, simply operated to transfer her title to the note to the assignee or endorsee thereof. But where, after "An act concerning married women," approved March 25th, 1879, took effect and while it remained in force, a married woman assigned by endorsement a promissory note, negotiable under the statute and not by the law merchant, she and her separate estate, real and personal, are liable on her contract of assignment, "the same as if she were sole," upon execution or other judicial process; and no subsequent change, modification or even repeal of the provisions of such act will affect or impair the obligation of her contract of assignment.

From the Morgan Circuit Court.

C. E. Davis, J. H. Jordan and *O. Matthews,* for appellant.

HOWK, C. J.—This cause was submitted to the court for trial, upon the issues joined, and, at the request of the parties, the court made a special finding of the facts, and stated its conclusions of law thereon, as follows:

"On the 15th day of September, 1880, Levi R. Bradley made his promissory note to Hannah Mathes (the appellant), promising to pay to her order, on or before the 29th day of October, 1881, $541.80, value received, without relief from valuation or appraisement laws, without interest; and said Bradley also executed a mortgage to said Hannah on eighty acres of land in Brown county, Indiana, to secure the payment of said note. On the 20th day of September, 1880, Hannah Mathes sold and assigned said note, by endorsing her name thereon, to James S. Coleman, and received therefor of said Coleman a deed of a house and lot in the town of Morgantown, Morgan county, Indiana, and the possession thereof, of the value of $450, and merchandise of the value of $75, making the sum of $525, received for her said endorsement of said Coleman, all of which she converted to her own use. Hannah Mathes, when said note was executed to her and when she sold and endorsed the same to said Coleman, was and still is a married woman, and resided with her husband on her own farm; and she was not carrying on, or engaged in, any special or separate business, when she so endorsed said note.

"The merchandise she received of Coleman was to be used in her family; and the house and lot she received of him, she intended to use as a residence, but, after holding it for a time, she sold it. Said Bradley was indebted to her for land she sold him, and executed to her the said note therefor. On the 1st day of October, 1880, Coleman endorsed said note for its par value to the plaintiffs Ellen and James R. Shank. When such note became due, the plaintiffs Shank and Shank brought suit against said Bradley in the Brown Circuit Court, and obtained judgment against him for $547.66 due on such note, with $54.25 costs, collectible without relief from valuation or appraisement laws, and for the foreclosure of said mortgage and an order to sell said eighty acres of land to satisfy the same. Upon proper execution the land was duly sold for the sum of $100, which was applied on said judg-

ment and costs, and said execution was returned no other property found on which to levy.

"In this action, judgment was rendered in favor of the plaintiffs Shank and Shank, against the defendant Coleman, on the 16th day of December, 1882, in his lifetime, for the sum of $531.50, which judgment has not been paid to the plaintiffs by Coleman in his lifetime, or by his administrator, but it is a prior lien on such real estate of Coleman, as absolutely secures it. Said Bradley, the maker of said note, at no time after its execution, had any property other than the mortgaged land, out of which said debt or any part thereof could be made. Hannah Mathes has paid nothing to the plaintiffs, or said Coleman or his estate, on account of her endorsement of said note."

Upon the foregoing facts, the court stated its conclusions of law as follows:

"The defendant Hannah Mathes is bound by her assignment or endorsement of said note to said Coleman and to the plaintiffs, as the assignees of said Coleman, for so much as could not be made by proper action and diligence off of said Bradley and the land mortgaged by him to secure said note; that the plaintiffs recover of the defendant Hannah Mathes the sum of $525, being the amount received by her for said note and mortgage of said Coleman, less the amount realized on said foreclosure against said Bradley, with interest accrued thereon, to be collected without relief from valuation or appraisement laws; and that if the estate of said Coleman shall pay plaintiffs their said judgment against said Coleman, then execution shall issue against the defendant Hannah Mathes, for the benefit of said estate, and all collections thereon shall enure to the benefit of said estate."

Over the exceptions of the appellant, Hannah Mathes, to each and all of said conclusions of law, the court rendered judgment thereon against her, in favor of the appellees Ellen and James R. Shank, and a conditional judgment in favor

of the appellee Isaac Knight, administrator of the estate of said James S. Coleman, deceased.

This suit was brought by the appellees Ellen and James R. Shank, as the assignees of a promissory note not payable to order or bearer in a bank in this State, against James S. Coleman, as their immediate assignor, and the appellant, Hannah Mathes, as their remote assignor, of such note, under the provisions of section 5504, R. S. 1881, in force since July 5th, 1861. There was, certainly, a misjoinder of causes of action in the plaintiffs' complaint, but as such misjoinder, under section 344, R. S. 1881, affords no ground for the reversal of the judgment, we need not further notice it. As between the appellant, Hannah Mathes, and the appellees Ellen and James R. Shank, the controlling question for decision, in this case, is based upon the fact found by the trial court, that at the time Hannah Mathes assigned, by endorsement, the note of Levi R. Bradley to her co-defendant James S. Coleman, she was and had been since a married woman, and resided with her husband on her own farm. At the time Bradley executed such note to the appellant, Hannah Mathes, or order, and at the time she assigned the note, by endorsement, to her co-defendant Coleman, "An act concerning married women," approved March 25th, 1879, was the law of this State, and defined, to the extent specified therein, the rights, powers and liabilities of a married woman. The act in question contained no repealing clause or section, but in so far as its provisions were inconsistent, or in conflict, with the existing laws of this State, whether of common law or statutory origin, it repealed by necessary implication so much, and so much only, of such existing laws. *Haas* v. *Shaw*, 91 Ind. 384; *Frazer* v. *Clifford*, *ante*, p. 482.

Before and at the time the above entitled act of March 25th, 1879, took effect and became a law, to wit, on May 31st, 1879, the common law rule that a married woman is incapable of binding herself by an executory contract, and that any such contract made by her during coverture, whether in writ-

ing or by parol, is absolutely void at law, was the law of this State, recognized and acted upon in numerous decisions of this court. *O'Daily* v. *Morris*, 31 Ind. 111; *American Ins. Co.* v. *Avery*, 60 Ind. 566; *Godfrey* v. *Wilson*, 70 Ind. 50; *Liberty, etc., Association* v. *Watkins*, 72 Ind. 459; *Eberwine* v. *State, ex rel.*, 79 Ind. 266; *Parks* v. *Barrowman*, 83 Ind. 561.

While this common law rule prevailed in this State, and prior to May 31st, 1879, when the aforesaid act of March 25th, 1879, took effect and became a law, the assignment or endorsement of a promissory note by a married woman simply operated to transfer her title thereto to the assignee or endorsee thereof. *Collier* v. *Connelly*, 15 Ind. 141; *Moreau* v. *Branson*, 37 Ind. 195; *Baker* v. *Armstrong*, 57 Ind. 189; *Paulman* v. *Claycomb*, 75 Ind. 64. But it was never held, under the common law rule, that a married woman, by her assignment by endorsement of a promissory note, negotiable under the statute and not by the law merchant, assumed and was bound by the ordinary contract of the assignor or endorser of such a note. We have often held that, as a general rule, the contract of the assignor of such a note is a warranty that the maker is liable on the note, and able to pay it. *Black* v. *Duncan*, 60 Ind. 522; *Ward* v. *Haggard*, 75 Ind. 381; *Willson* v. *Binford*, 81 Ind. 588; *Huston* v. *First National Bank, etc.*, 85 Ind. 21.

In the case at bar the question for decision may be thus stated: Where a married woman has assigned, by endorsement, a promissory note not negotiable as an inland bill of exchange, after the above entitled act of March 25th, 1879, took effect, and while it remained in full force, has she assumed and is she bound by the ordinary contract of an assignor of such a note? We are of opinion that this question must be answered in the affirmative. In section 1 of the aforesaid act it was provided that "A married woman may bargain, sell, assign and transfer her separate personal property the same as if she were sole." Acts 1879, p. 160. Section 3 of such act, in so far as applicable to the question

under consideration, provided as follows: "A married woman may enter into any contract in reference to her separate personal estate, * * * * the same as if she were sole, and her separate estate, real and personal, shall be liable therefor on execution or other judicial process." *Supra.*

Under these statutory provisions, it would seem to be clear that a married woman might sell, assign and transfer any promissory note, owned and held by her as her separate personal property, "the same as if she were sole," and that if she had assigned, by endorsement, any such promissory note so owned and held by her, while such statutory provisions were in force, she and her separate estate, real and personal, would be liable on her contract of assignment, "the same as if she were sole," upon execution or other judicial process. No subsequent change, modification or even repeal of the statutory provisions, above quoted, would affect or impair the obligation of such contract of assignment, entered into by a married woman, while such provisions were in full force. Sections 10 and 69, R. S. 1881.

Our conclusion is, therefore, that the court did not err in its conclusion of law in favor of the appellees Ellen and James R. Shank, and against the appellant, Hannah Mathes.

We are of opinion, however, that the proceedings had in the trial court, upon the cross complaint, as it is called, of the defendant James S. Coleman against his co-defendant, Hannah Mathes, are erroneous and can not be sustained. We have already said, that the cause of action in favor of the appellees Ellen and James R. Shank against the defendant James S. Coleman, as their immediate assignor of the note of Levi R. Bradley, was improperly united with their cause of action against the appellant, Hannah Mathes, as their remote assignor of such note. The two causes of action were separate and distinct, each from the other; and what might have constituted a complete defence to their cause of action against their remote endorser, Hannah Mathes, would have constituted no defence whatever to their cause of

action against their immediate endorser, James S. Coleman. Section 5504, *supra; Huston* v. *First Nat'l Bank, etc., supra.*

It was not claimed in the cross complaint of Coleman, that he had sustained any damages by reason of any breach of the warranty contained in the assignment by endorsement of the note of Levi R. Bradley by the appellant, Hannah Mathes. Therefore, the appellant's demurrer to Coleman's cross complaint, for the alleged insufficiency of the facts therein to constitute a cause of action against her, ought to have been sustained by the trial court. The overruling of appellant's demurrer to Coleman's cross complaint is assigned here as error, and is well assigned. As this error lies at the base of Coleman's proceedings and judgment, in this cause, and will require the reversal of Coleman's judgment against the appellant, Hannah Mathes, we need not consider or decide any question complained of, as erroneous, in Coleman's subsequent proceedings.

The judgment against Hannah Mathes, in favor of Ellen Shank and James R. Shank, is affirmed, with costs.

The judgment against Hannah Mathes, in favor of James S. Coleman, is reversed, with costs, and the cause remanded with instructions to sustain the demurrer to Coleman's cross complaint, and for further proceedings not inconsistent with this opinion.

Filed April 15, 1884.

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No. 11,296.

AIKEN v. ISING.

INTERROGATORIES TO JURY.—*When Part of Record.*—Interrogatories will not be considered a part of the record unless it affirmatively appears that they were submitted by the court to the jury.

SAME.—*Evidence.—Verdict.—Damages.—Supreme Court.*—Where it does not appear that interrogatories were thus submitted, an answer that $30 of an item not sufficiently proved was allowed will not be considered, and if the evidence as to the other items is sufficient to support the general verdict, the damages assessed will not be deemed excessive.

From the Superior Court of Vanderburgh County.

C. Denby and *D. B. Kumler*, for appellant.

J. Brownlee, for appellee.

BEST, C.—This action was brought by the appellee against the appellant upon an account, consisting of various items, amounting to $334.75, among which was an item of $73.50, alleged to have been paid by the former to the latter by the mutual mistake of the parties as to the quantity of cultivated land in a farm for which the appellee was paying rent, and through such mistake he paid the appellant $73.50 more than was due him.

The appellant answered in denial, payment, and a set-off, amounting to $249.66. The answers of payment and set-off were denied, the issues were tried by a jury, and a verdict returned for the appellant for $131.75, upon which, over a motion for a new trial, for the alleged reasons that the verdict was not sustained by the evidence, and the damages assessed were excessive, final judgment was rendered.

The ruling upon the motion for a new trial is assigned as error.

The first reason embraced in the motion is not urged, as it is conceded that under the rules of this court the judgment can not be disturbed on such ground.

The second is relied upon. The jury, in answer to an interrogatory, stated that they allowed $30 on account of the money alleged to have been paid by mistake as to the quantity of land cultivated in the farm, and the appellant insists that there was no evidence whatever of any mistake of the parties, and, therefore, the allowance of such sum rendered the damages excessive.

The evidence in this case, aside from this item, is sufficient to support the verdict, and in order to reach the conclusion that the damages are excessive, it must affirmatively appear that $30 of this item entered in the general verdict. This does not appear otherwise than by the answer of the jury to

the interrogatory, and if these interrogatories are not a part of the record, then this fact does not appear, and the damages can not be considered excessive.

The request to submit these interrogatories, the interrogatories and their answers, are copied in the record immediately after the general verdict, but it nowhere appears that they were submitted to the jury by the court, and for this reason, as has several times been decided, they can not be regarded as a part of the record. *Cleveland, etc., R. W. Co.* v. *Bowen*, 70 Ind. 478; *Hervey* v. *Parry*, 82 Ind. 263.

In the absence of these interrogatories, it does not appear that any portion of this item was allowed, and as the evidence in support of the other items was sufficient to support the verdict, the damages assessed do not appear excessive. The motion for a new trial can not be disturbed on this ground, and as the record presents no other question, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellant's costs.

Filed Jan. 24, 1884. Petition for a rehearing overruled March 28, 1884.

No. 10,951.

BUSH *v.* BANTA.

PRACTICE.—*Evidence.*—The record on appeal must show that objection or exception was taken to the introduction of the evidence complained of, to present the question, in the Supreme Court, of its admissibility.

From the Boone Circuit Court.

F. M. Charlton, R. W. Harrison and *B. S. Higgins*, for appellant.

C. S. Wesner, for appellee.

HAMMOND, J.—This was an action by the appellee against

the appellant upon a complaint for goods sold and delivered, etc. Answer by general denial and set-off; reply in denial of the set-off; trial by jury; verdict for the appellee, and judgment on the verdict, over the appellant's motion for a new trial, and exceptions.

The appellant complains in his brief of the introduction of certain evidence by the appellee. The record fails to show that any objection or exception was taken to the introduction of the evidence complained of. No question as to its admission is, therefore, presented to this court. 1 Works Pr., section 928.

There is evidence in the record which, though in conflict with other evidence, fairly sustains the verdict.

Judgment affirmed with costs.

Filed April 4, 1884.

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149 160

No. 10,986.

ROACH v. WHITE.

DESCENTS.—*Devise.—Estoppel.—Husband and Wife.*—The consent by a husband that his wife may devise her real estate to her child by a former marriage does not estop him from asserting title, after her death, to one-third of the premises, as given to him by section 2485, R. S. 1881.

From the Superior Court of Vigo County.

I. N. Pierce and *T. W. Harper*, for appellant.

N. G. Buff and *J. T. Pierce*, for appellee.

NIBLACK, J.—Complaint by John White against Mary Roach for the partition of real estate. The complaint charged that Bridget White, the late wife of the plaintiff, had died testate and seized of a part of a lot, particularly described, in the city of Terre Haute; that the said Bridget, by her last will and testament, had devised said real estate to the defendant; that, in virtue of the premises, the plaintiff had become the owner in fee of one undivided one-third part of said real

estate, and the defendant of the remaining undivided two-thirds, each as tenant in common with the other.

The defendant answered: *First.* In general denial. *Second.* By way of cross complaint, averring that the decedent, Bridget White, was the owner of the part of lot in controversy before she intermarried with the plaintiff; that she and the plaintiff had lived together as husband and wife for near twenty years, and had by their joint efforts during that time accumulated other real and personal property of the value of $5,000, the title to all of which had been placed in the name of the plaintiff; that no children were born to the decedent and the plaintiff as the result of their marriage; that early in their married life they took the defendant, then a child only a few months old, "into their family, with a view, agreement and understanding" that they would provide for her a home until she arrived at full age, or got married, when she was to have a reasonable outfit with which to start in life; that the defendant was to remain in the family, and work and labor as a member thereof, until she became of age or got married as above stated; that the defendant remained in the family of the decedent and the plaintiff, doing all the work therein that she was able to do, until she arrived at the age of eighteen years; that in October, 1881, which was after she had arrived at that age, the decedent being in failing health, and desirous of doing something in her lifetime to compensate the defendant for her services, resolved to devise to her the part of the lot described in the complaint; that the decedent did accordingly, during said month of October, 1881, "with a full knowledge of all the foregoing facts on the part of the plaintiff, and with his full consent thereto," and by her last will and testament, devise said part of lot to the defendant, which last will and testament was duly admitted to probate after the decedent's death; that the defendant accepted the devise of said real estate to her as a full discharge of all claims against the decedent and the plaintiff for services and an outfit as a start in life, and went into, and has ever since

continued in, possession thereof, paying taxes, and making lasting and valuable improvements thereon. Wherefore the defendant demanded that her title be quieted.

A demurrer, for want of sufficient facts, was sustained to the cross complaint, and, at the trial which ensued, the court made a finding that the plaintiff was the owner in fee of one undivided third part of the real estate in litigation, and that the defendant was the like owner of the remaining two-thirds; also that the real estate was indivisible. Upon this finding the court decreed a sale of the real estate, ordered a division of the proceeds according to the respective interests of the parties as above stated, and appointed a commissioner to make the sale.

Error is assigned only upon the decision of the superior court sustaining the demurrer to the cross complaint.

By section 2485, R. S. 1881, it is enacted that "If a wife die testate or intestate, leaving a widower, one-third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage."

The inference from this section manifestly is that the right of the surviving husband to one-third part of the real estate of which his wife has died seized is absolute, except in cases in which this right has been waived by some agreement, either antenuptial or postnuptial, or where he is restrained by some estoppel which he has imposed upon himself.

The appellee's knowledge that his wife desired to devise the real estate in question to the appellant, and his consent that she might do so, did not constitute either a waiver or an estoppel, and hence there was nothing charged in the cross complaint which restrained the appellee from asserting his claim to one-third of the real estate as surviving husband of his deceased wife. The facts as stated afford no pretence that there was any agreement on the part of the appellee to relinquish his inchoate interest in the real estate, or that there were any representations made by the appellee to the appellant tending to induce her to believe that he would assert no claim

to the real estate so devised to her; indeed, there was nothing in the appellee's consent that his wife might devise the real estate to the appellant inconsistent with the claim he now makes as the surviving husband, since his wife could not, by her will, deprive him of his one-third interest in her lands.

In principle the case of *O'Harra* v. *Stone*, 48 Ind. 417, decides this case adversely to the appellant. See, also, the case of *Adamson* v. *Lamb*, 3 Blackf. 446.

The judgment is affirmed, with costs.

Filed April 16, 1884.

No. 10,539.

HARTLEP v. COLE.

PLEADING.—*Complaint.—Supreme Court.*—Where the only objections to the sufficiency of a complaint are, that it states, in one paragraph, several items of indebtedness on different accounts, and fails to aver that either or all of them are due and unpaid, and that the bill of particulars therewith filed fails to show that the items therein were between the parties to the suit, such objections come too late and afford no ground for the reversal of the judgment, when presented for the first time, after verdict and judgment, by an assignment of error in the Supreme Court that the complaint does not state facts sufficient to constitute a cause of action.

PRACTICE.—*Motion for New Trial.—Absence of Evidence.—Supreme Court.*—Where the only causes assigned for a new trial are, that the verdict is not sustained by sufficient evidence and is contrary to law, the alleged error of the circuit court in overruling the motion for a new trial, in the absence of the evidence from the record, presents no question for the decision of the Supreme Court.

From the Warren Circuit Court.

J. W. Sutton and —— *Hunter*, for appellant.

J. McCabe and *E. F. McCabe*, for appellee.

HOWK, C. J.—The appellant, Hartlep, the defendant below, has assigned here the following errors:

1. The court erred in overruling his motion for a new trial;

2. The court erred in rendering judgment for appellee; and,

3. The appellee's complaint does not state facts sufficient to constitute a cause of action.

The last one of these assignments of error calls in question the sufficiency of appellee's complaint after verdict and judgment thereon, for the first time in this court. In discussing this alleged error, the appellant's counsel insist that the complaint is defective, in two material particulars, namely:

1. It alleges, in a single paragraph, several distinct items of indebtedness on different accounts, and fails to aver that either or all of said items are due and unpaid;

2. Because the bill of particulars, filed with the complaint, fails to show that the items of account therein were between the parties to this suit.

The appellee alleged in his complaint, (1) that the appellant "is indebted to him," in a certain sum, for goods sold and delivered, etc., "also, for work and labor of the value," etc., and interest, done by appellee for him; (2) also, that appellant "owes" appellee a certain other sum, and interest, "for money lent to him;" (3) also, that appellant "is indebted to him," in a certain other sum, "for services as the attorney" of the appellant, etc. In so far as the appellant's first objection to the complaint is concerned, it would not have been well taken even if he had demurred to the complaint, at the proper time, for the want of sufficient facts; and, certainly, such an objection to the sufficiency of the complaint, when made for the first time in this court, can not be made available for the reversal of the judgment. In *Mayes* v. *Goldsmith*, 58 Ind. 94, the defendant's indebtedness to the plaintiffs was alleged in substantially the same terms, and the same objection was presented to the complaint, by a demurrer thereto for the want of sufficient facts, as in the case at bar, and it was held by this court, that such demurrer was correctly overruled. It was there said: "It is objected to the complaint that it does not appear therefrom that the

amount claimed was due, that is, that the demand was a matured one. The language of the complaint is, that the defendant 'is indebted,' etc. We think this implies a present indebtedness; in other words, that the claim was mature." To the same effect, substantially, are the following cases: *Johnson* v. *Kilgore*, 39 Ind. 147; *Humphrey* v. *Fair*, 79 Ind. 410; *Heshion* v. *Julian*, 82 Ind. 576.

But it is claimed by appellant's counsel, that the trial court erred in not carrying back the demurrers to the third and fourth paragraphs of answer and sustaining the same to appellee's complaint. It will suffice to say, that no such error, if such it be, is assigned by the appellant on the record of this cause. "The assignment of errors constitutes the appellant's complaint in this court, and to it alone is the appellee required to answer. It is the foundation of the appellant's proceedings for review in this court, and we can not consider nor decide any question which is not fairly presented by the assignment of errors." *Hutts* v. *Hutts*, 62 Ind. 214.

Immediately following the complaint, in the transcript, is the bill of particulars, prefaced as follows: "Bill of particulars of the items of the accompanying complaint." It sufficiently appears, we think, from this prefatory statement, that the items of account, in the bill of particulars, were between the parties to this suit.

The appellant neither objected nor excepted, in the trial court, to the judgment therein rendered in this cause, as to either its form or substance. Therefore, the second error assigned by the appellant presents no question for our decision. *Teal* v. *Spangler*, 72 Ind. 380.

In discussing the alleged error of the court, in overruling the motion for a new trial, the appellant's counsel say: "The motion should have been sustained, for the reason that the complaint does not state facts sufficient to constitute a cause of action." We need hardly say that this was not a proper cause or reason to be assigned in the motion for a new trial; nor was it so assigned by appellant in his motion in this case.

The only causes for a new trial, assigned by the appellant, were that the verdict of the jury was not sustained by sufficient evidence, and was contrary to law. These causes for a new trial, in the absence of the evidence, present no question for our decision, and the evidence is not in the record. We are bound to conclude, therefore, as we do, that the court committed no error in overruling appellant's motion for a new trial. The judgment is affirmed, with costs.

Filed April 4, 1884.

No. 10,893.

JONES v. SWIFT ET AL., EXECUTORS.

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REPLEVIN BAIL.—*Fraud.*—*Principal and Surety.*—Judgment was obtained against a principal and three sureties, and execution thereon stayed by replevin bail. Afterwards one of the original sureties was released by the judgment plaintiff in consideration that J. would become additional replevin bail, which he did upon the false assurance of the principal debtor that the other original sureties consented thereto, which in truth they did not, and they afterwards procured a decree releasing them from the judgment.

Held, that J. was bound as replevin bail, the creditor having no knowledge of the fraud.

From the Fayette Circuit Court.

G. C. Florea and *C. Roehl*, for appellant.

R. Conner, *B. F. Claypool* and *J. H. Claypool*, for appellees.

COLERICK, C.—No question involving the sufficiency of any of the pleadings in this action has been presented to us, and no recital of their averments is necessary to be made in determining the questions that have been submitted for our consideration. The issues formed by the pleadings were tried by the court, who, at the request of the parties, made a special finding of the facts in the case, and its conclusion of law thereon, as follows:

"1st. That on the 20th day of June, 1877, said John

Swift recovered a judgment in the Fayette Circuit Court against one Thomas Monger, as principal, and against William Brumfield, John G. Diehlman and Jeptha Steele, as sureties for said Thomas Monger, for the sum of $1,642.42.

"2d. That on the 16th day of July, 1877, an execution was issued on said judgment, and placed in the hands of said sheriff of Fayette county for service, etc.; and on said execution replevin bail was regularly entered and signed by Lewis and George H. Monger, on the 20th day of July, 1877, and on said day said execution was by said sheriff returned with his doings thereon.

"3d. That on the margin of said judgment mentioned in finding number one above, there was entered the following release, to wit: 'I hereby release Jeptha Steele, and his lands, from all liability on account of this judgment.

"'August 24th, 1877. JOHN SWIFT.

"'Attest: J. G. F. LEACH, Clerk.'

"And below, and attached to said judgment, the following was entered, to wit: 'I, Joseph B. Jones, acknowledge myself replevin bail for the payment of the above judgment, interest and costs, for the time allowed by law for the stay of execution, together with Lewis Monger and George H. Monger, who have already stayed the same.

"'August 24th, 1877. J. B. JONES.'

"4th. That said entry of release of said Steele by said Swift, and said entry of replevin bail by said Joseph B. Jones, were concurrent acts, and were made under the following circumstances, to wit: Steele desired to be released from said judgment, and Thomas T. Monger, the principal in the original judgment above mentioned, desired to have him released. Said Monger, Swift, Jones, and L. W. Florea, attorney for Steele, were in the clerk's office of said Fayette Circuit Court, when said Monger requested Swift to release said Steele from said judgment. This he agreed to do provided Brumfield and Diehlman were consenting thereto, and said Jones would become such replevin bail thereon, and

Jones consented to become such replevin bail, if said Brumfield and Diehlman were consenting to such release, and thereupon said Monger was asked if said Brumfield and Diehlman were so consenting to said release, and he answered that they were, and immediately thereafter said release was signed by said Swift, and said replevin bail was signed by said Jones.

"5th. That said William Brumfield and Jos. G. Diehlman had not consented, and did not consent, to said release of said Steele before and at the time of the entry of the same, or before or at the time of the entry of said replevin bail by said Jones.

"6th. That afterwards, to wit, on the 10th day of August, 1878, said Swift procured the issuance of an execution on said judgment, which execution was placed in the hands of the then sheriff of said county, and thereupon, on the 17th day of October, 1878, said Brumfield and Diehlman filed their complaint in said Fayette Circuit Court against said sheriff, John Swift, Lewis Monger, George H. Monger and Joseph B. Jones, praying to be released from further liability on said judgment, and that the defendants thereto be enjoined from proceeding on said judgment and execution against the property of said Brumfield and Diehlman, and charging in said complaint the release of said Steele without their knowledge and consent, etc., and that said Joseph B. Jones, on the 24th day of August, 1877, with full knowledge of said release, entered and signed the replevin bail heretofore set out; that all the defendants to said complaint were duly summoned, and all suffered default except said Jones, who did not answer the same, but filed the original cross complaint herein; that on said default, and upon trial had, judgment was, on the 10th day of the October term, 1878, of said Fayette Circuit Court, duly rendered in favor of said plaintiffs Brumfield and Diehlman, releasing them from liability on account of said original judgment, and enjoining said defendants from further pro-

ceeding to collect the same from the property of the plaintiffs Brumfield and Diehlman.

"From these facts I concluded that Joseph B. Jones, the plaintiff in this cross action, is not released on the replevin bail on said judgment, and, therefore, find for the Swifts, the defendants in this cross action.

"SAMUEL A. BONNER,
"Judge F. C. C."

To which findings of fact and conclusion of law the appellant objected and excepted, and also objected to the same, because they were not made and rendered within sixty days from the time said cause was taken under advisement by the court, which objection was overruled by the court, and to which ruling the appellant excepted, and thereupon filed his motion for a new trial, which was overruled, and judgment was then rendered in favor of the appellees, from which the appellant appeals.

The errors assigned are:

1. That the special findings are contrary to the evidence.

2. That the judgment and conclusion of law upon the facts found are contrary to law.

3. That the court erred in its conclusion of law upon the facts found.

4. That the court erred in overruling the motion for a new trial.

5. That the court erred in making, filing and recording its special finding of facts and conclusion of law thereon, over the objection of the appellant, after sixty days from the time the cause was taken under advisement by the court.

6. That the court erred in rendering judgment for the appellees over the objection of the appellant.

It is quite evident from the facts found by the court, that the appellant was induced to become such replevin bail by reason of the representation of Monger, the principal judgment defendant, and at whose instance the appellant became replevin bail, that Brumfield and Diehlman were consenting

to the release of Steele, one of the judgment defendants. The representation so made was false and fraudulent. But it was not found by the court, nor is it claimed by the appellant that there was any evidence showing, or tending to show, that Swift, the judgment plaintiff, was a party to, or participated in any manner in, the commission of the fraud.

Where one is induced to become replevin bail by the false or fraudulent representations of the judgment defendant, he is held bound as such replevin bail, unless the judgment plaintiff was a party to, or had knowledge of, the fraud. *Lepper* v. *Nuttman*, 35 Ind. 384; *Vincennes Nat'l Bank* v. *Cockrum*, 64 Ind. 229. In *Lepper* v. *Nuttman*, *supra*, which was an action to revive a judgment that had been rendered against one Schmidt, Lepper, who was replevin bail thereon, sought, by his answer, to be relieved from liability, by averring therein that he had been induced to become such replevin bail through the false representations of Schmidt. It was held by this court that the answer was insufficient, because it did not in any way connect the judgment plaintiff with the alleged false representations. The court said: "Schmidt was the judgment defendant, and it was through his representations, as the answer alleges, that the appellant became replevin bail. Unless the representations were made by Nuttman, the judgment plaintiff, or by some one for him and with his consent or procurement, he can not be affected by them."

If the principal, by fraud, induces the surety to become bound, but the obligee has no notice thereof, such fraud, as a general rule, will be no defence to the surety. Brandt Suretyship and Guaranty, section 353. The fraud which will vitiate a contract of suretyship must be one to which the person benefited by the contract is a party, or, at least, of which he had notice. Baylies Sureties and Guarantors, 214 and 424. It must be shown that the judgment plaintiff had an agency in the fraud. *Jenners* v. *Howard*, 6 Blackf. 240; *Craig* v. *Hobbs*, 44 Ind. 363.

In the case under consideration, the appellant, by the exer-

cise of ordinary prudence, might have guarded and protected himself against the fraud that was practiced upon him, by requiring Monger to procure and produce the consent, in writing, of Brumfield and Diehlman to the release of Steele, before becoming such replevin bail, or by requiring them to enter such consent on the record of the judgment, or by making personal inquiry of them as to their having consented to the release. It was negligence on the part of the appellant to rely solely upon the representation of Monger, when the means of ascertaining, with certainty, the truth of Monger's assertion, and preventing the commission of the fraud that was perpetrated, was within his power. There can be no fraud practiced on a surety who has the means of acquiring full knowledge of the facts. Burge Suretyship, 229. It is the duty of the surety to look out for himself, and ascertain the nature of the obligation embraced in the undertaking. Any other rule would not only work serious inconvenience, but render securities of this character of but little, if any, value. Baylies Sureties and Guarantors, 214. Fraud must not be induced by the person complaining of it, nor must he suffer himself to become an indolent victim. He must exercise reasonable diligence to inform himself as to his action in becoming surety. *Stedman* v. *Boone*, 49 Ind. 469. In this case it was proper to apply the familiar principle of law, that where one of two innocent persons must suffer loss, it must be borne by the one guilty of negligence. *Anderson* v. *Warne*, 71 Ill. 20.

The law will not permit the appellant to escape the liability which he incurred, by showing that he became such replevin bail upon a condition not named in the writing which he executed, and which constituted a written contract, by which his liability was created, and is to be measured. In legal effect, it was an absolute and unconditional promise to pay the judgment. *Vincennes Nat'l Bank* v. *Cockrum*, 64 Ind. 229. Its terms can not be varied by a contemporaneous parol agrement, *Smith* v. *Tyler*, 51 Ind. 512, as this would

be engrafting upon the obligation a condition which would contradict its terms and subvert its legal effect. *Parks* v. *Zeek*, 53 Ind. 221. There is no principle of law more firmly settled by the decisions of this court than the one that, "Where a contract is reduced to writing, the legal presumption is, that the entire contract, as finally settled, is embraced therein, and all oral negotiations or stipulations between the parties, which preceded or accompanied the execution of the instrument, are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves." *Durland* v. *Pitcairn*, 51 Ind. 426, and the cases there cited.

The conclusion of law declared by the court upon the facts found was not erroneous.

The reasons assigned in support of the motion for a new trial were:

1. That the finding of the court was contrary to the evidence.
2. That the finding of the court was contrary to law.
3. "That the issues of law and fact in said action were submitted to the court for trial, and the court having taken the same under advisement, the judge thereof failed and neglected to make, render or file his finding therein within sixty days thereafter, but held the same for more than sixty days thereafter, he, the said judge, not being prevented from so doing within sixty days by the severe illness of himself and family."
4. That the finding of the court was contrary to law and the evidence.

We have carefully examined the evidence, and find that it is conflicting as to all the material facts in the case. Under the long established practice of this court we are precluded from weighing the evidence so as to determine its preponderance, and, therefore, can not disturb the finding of the court on the weight of the evidence.

The only question remaining for consideration is the one presented by the third cause assigned for a new trial, above

set forth. The record shows that the trial of the action was completed on the 25th day of January, 1883, and was then taken under advisement by the court, but no decision was rendered therein until the 9th day of April, 1883, being a period of more than sixty days. The statute provides: "Whenever any issue of law or fact is submitted to the court for trial, and the judge shall take the same under advisement, the judge shall not, except in case of severe illness of himself or family, hold the same under advisement for more than sixty days; and, if the court wherein said issue arose be not then in session, he shall file his determination therein, in writing, with the papers in the case." R. S. 1881, section 551. This statute is of a remedial nature, and was, evidently, enacted in the interest and for the benefit of litigants, in expediting the final disposition of their actions in courts of justice, by requiring the judges thereof trying the same, to render within a reasonable time, so prescribed, their decisions therein. It is to be construed as a rule for the government of the court, and as a compulsory means of compelling judges to render prompt decisions in actions tried by them, so as to mitigate, to that extent, the annoyance and expense incident to protracted litigation. It will not do to hold that this statute may be used as a weapon against the successful litigant, for whose protection it was enacted, by rendering ineffectual the judgment rendered in his favor, because the judge violated or failed to observe its provisions. To avoid such injustice the statute must be construed as directory. It is said in Sedgwick on Statutory and Constitutional Law, 316, that "When statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed. In these cases, by a somewhat singular use of language, the statute is said to be directory."

In *Nave* v. *King*, 27 Ind. 356, it was said by this

court: "In *People* v. *Allen*, 6 Wend. 486, the court, as we think, correctly laid down the general rule to be, that where the statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory, unless the nature of the act to be performed, or the language used by the Legislature, shows that the designation of time was intended as a limitation of the power of the officer." See, to the same effect, *Ryan* v. *Vanlandingham*, 7 Ind. 416; *Ketcham* v. *New Albany, etc., R. R. Co.*, 7 Ind. 391.

It is a legal maxim that "An act of the court shall prejudice no man." In Broom's Legal Maxims, 122, it is said: "The above maxim 'is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law.' In virtue of it where a case stands over for argument from term to term on account of the multiplicity of business in the court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case." And Wharton, in his work on Legal Maxims, p. 21, in referring to this maxim, says: "Where the time has gone by for entering up judgment through the delay of the court, judgment will be ordered to be entered up *nunc pro tunc*, that is, the proceeding in question may be taken now, instead of at the time when it would have been taken but for default of the court, for the convenience of the court, through press of business, taking time to deliberate on its judgment, death of the party, or other like cause."

No error was committed in overruling the motion for a new trial, and the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed April 17, 1884.

No. 11,343.

DAVIS v. BYRD.

WITNESS.—*Separation.—Exclusion of Testimony.—Case Criticised.*—Where there is an order separating witnesses, a party without fault can not, by the disobedience of his witness, be deprived of his testimony. *Jackson* v. *State*, 14 Ind. 327, criticicised,

From the Montgomery Circuit Court.

J. R. Courtney, for appellant.

M. Thompson, *W. H. Thompson* and *W. B. Herod*, for appellee.

ELLIOTT, J.—The trial court ordered the separation of witnesses, and Frank Pennington, a witness for the appellant, had notice of this order, although not in court at the time it was made; notwithstanding this notice, he came into the court room and remained while several witnesses were testifying. It does not appear that the appellant was in any manner responsible for the presence of the witness in the court room, nor that he did anything to bring it about, nor that he had any knowledge of the violation of the order of the court by the witness. On the motion of the appellee, the court refused to permit the witness to testify, and this ruling presents the only question in the case.

A witness who disobeys the order of the court excluding him from the court room should be punished, and severely punished, for his disobedience, but this punishment should fall on the guilty person, and not on an innocent party. It is difficult to imagine any principle of law which will justify the punishment of an innocent party for the contumacious behavior of a witness. A litigant has no authority over the witnesses subpœnaed by him, and is not answerable for their wrongful conduct, and he ought not to be denied a right because a wrong has been committed for which he is neither morally nor legally responsible. It may be a very serious punishment to be deprived of the testimony of a witness,

and if the party is himself free from fault, this punishment should not be visited on him; if, however, he is in fault, if he has directly or indirectly influenced the witness to disobey the order of the court, or if he has knowingly suffered it, then it is but just that he should pay the penalty of his wrongful act by the loss of the witness's testimony. We hold the true rule to be this: Where a party is without fault, and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility. The modern authorities are overwhelmingly in favor of this doctrine. Mr. Bishop says: "On the other hand, if the party was without fault, the judge has no right to punish his innocence by depriving him of his evidence, and ruin him at the will of a witness. The testimony should be admitted, subject to observation to the jury. Such is the law in principle. * * * * * * Other judges, less mindful of these reasons, appear to deem it within their discretion in all cases of disobedience to the order to reject the witness." 1 Bishop Crim. Proc., sections 1191, 1192. An English author gives this statement of the rule: "But it seems to be now settled, that the judge has *no right to reject the witness* on this ground, however much his wilful disobedience of the order may lessen the value of his evidence." 2 Taylor Ev. 1210. The same doctrine is found in 2 Phillipps Ev. (5th Am. ed.) 744. Among the cases supporting the conclusion which we here announce are: *Davenport* v. *Ogg*, 15 Kan. 363; *Pleasant* v *State*, 15 Ark. 624; *State* v. *Salge*, 2 Nev. 321; *Grimes* v. *Martin*, 10 Iowa, 347; *Bell* v. *State*, 44 Ala. 393; *Keith* v. *Wilson*, 6 Mo. 435; *People* v. *Boscovitch*, 20 Cal. 436; *Hopper* v. *Com.*, 6 Grat. 684; *Gregg* v. *State*, 3 W. Va. 705; *Rooks* v. *State*, 65 Ga. 330; *Smith* v. *State*, 4 Lea (Tenn.) 428; *Bulliner* v. *People*, 95 Ill. 394.

In *Jackson* v. *State*, 14 Ind. 327, there was an element present which is absent from this case, namely, that the defend-

ant retained in the house one of his own witnesses, whereby he heard the testimony of the others. And this was an important element clearly distinguishing that case from this, for it connected the party with the disobedience of the order. There are, however, expressions in the opinion in that case to the effect that a witness who disobeys the order of the court may be excluded, and as these statements can not be regarded as correctly expressing the law, they are disapproved. The decision in *Porter* v. *State*, 2 Ind. 435, is not in conflict with the views here expressed. The point there decided was that it is not error to permit a witness to testify, although guilty of a disobedience of the order of the court. This, plainly enough, is a different thing from denying the party a right to introduce the witness. Judgment reversed.

Filed April 16, 1884.

No. 10,881.

HARVEY *v.* HUSTON.

NEW TRIAL.—*Evidence.—Bill of Exceptions.*—A motion for a new trial, based on alleged errors arising upon evidence, which refers to the evidence as set forth in a bill of exceptions not yet filed, presents no question.

SAME.—*Cause for.*—A motion for a new trial, upon a question of evidence, should clearly specify the evidence in question.

SAME.—*Grounds of Incompetency.*—An objection to evidence as incompetent should point out the grounds of such objection.

From the Superior Court of Vigo County.

S. R. Hamill, H. N. Spaan and *F. Heiner*, for appellant.

H. J. Huston, W. Mack, T. A. Foley, R. Dunnigan and *H. Dunham*, for appellee.

FRANKLIN, C.—Appellant, as assignee of one J. S. Jordon, sued appellee on a promissory note. The defendant answered failure of consideration. There was a trial by jury, verdict for the defendant, and, over a motion for a new trial, judg-

ment was rendered for the defendant for costs. The error assigned is the overruling of the motion for a new trial. And the reasons stated in the motion for a new trial, that are insisted upon, are the admissions of improper evidence. The record shows that the trial was had December 16th, 1882. The motion for a new trial was overruled, and judgment rendered January 13th, 1883, and sixty days given to file bill of exceptions. The appeal bond and bill of exceptions were filed February 24th, 1883.

Appellant, in stating the reasons for a new trial, instead of stating the evidence objected and excepted to, refers to it as the evidence contained in the general bill of exceptions therewith filed. There was no general bill of exceptions then filed with the motion, and none filed until a month and eight days afterwards. The evidence objected to could not in this way be brought to the attention of the court below in a manner in which it could decide upon it, and the motion can not be aided by the bill of exceptions which was afterwards filed. *Worthington* v. *Brown*, 48 Ind. 152; *Cobble* v. *Tomlinson*, 50 Ind. 550; *Sutherland* v. *Hankins*, 56 Ind. 343; *Miller* v. *Shriner*, 87 Ind. 141.

The foregoing covers all the reasons insisted upon in the motion for a new trial, except the fourth, which reads as follows:

"Error of the court in admitting in evidence, over the objection of plaintiff, the evidence of the assignor of the said note, Dr. J. S. Jordan, on cross-examination of said witness, as to the causes that in his opinion brought about the disease with which he, the witness, believed the defendant, at the time of the execution of the said note, was afflicted."

This statement of the reason is so general that we are unable to determine as to what questions and answers in the witness's testimony it can apply. His cross-examination is very lengthy, and there were a number of questions asked him in relation to what he told the defendant at the time the note was executed, and as to what he had testified to on a

former trial of the cause, but we find no questions or answers directly inquiring into or stating the cause of defendant's disease at the date of the execution of the note.

This reason, in the motion for a new trial, is too general to be held as a cause for the granting of a new trial or the reversal of the judgment. But had such testimony been given under the issues, and the examination in chief of this witness, we can not say that such testimony would have been irrelevant or immaterial, which were the only good objections made to it. Incompetency is too general, unless the incompetency is specified.

There is no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed April 17, 1884.

No. 11,208.

94 529
147 456
94 529
152 503
94 529
168 543

PFAFF, AUDITOR, *v.* THE STATE, EX REL. MAXWELL, CORONER.

COUNTY COMMISSIONERS.—*Claim against County.—Exclusive Original Jurisdiction.—Allowance.*—Under the provisions of sections 5758, 5759 and 5760, R. S. 1881, in force since May 31st, 1879, the board of commissioners of each county has exclusive original jurisdiction of every legal claim against such county, and every such claim must be presented to the board for allowance, and no other court can acquire jurisdiction of the claim, except by appeal from the judgment of the county board.

FEES OF CORONER'S INQUEST.—*Payable out of County Treasury.—County Auditor.—Mandate.*—The fees of a coroner's inquest are payable out of the county treasury, but the county auditor can not be compelled by mandate to draw his warrant therefor, until the coroner has presented his claim for such fees for allowance to the board of commissioners of the county.

From the Marion Circuit Court.

H. W. Woollen, for appellant.

V. Carter and *F. Winter*, for appellee.

HOWK, C. J.—This was a proceeding by mandate by the appellee's relator, as coroner of Marion county, to compel the appellant, as the auditor of such county, to issue his warrant on the treasurer of the county for the expenses of a certain inquest held and certified by the relator as such coroner. The appellant's demurrer, for the want of facts, to the complaint and alternative writ, was overruled by the court. An answer and return were then filed by the appellant, to which the relator's demurrer, for the alleged want of facts, was sustained by the court. The appellant excepted to this ruling, and declined to answer further or make further return. Judgment was rendered in appellee's favor for a peremptory mandate and costs.

The appellant has assigned as errors (1) the overruling of his demurrers to the complaint and alternative writ, and (2) the sustaining of a demurrer to his answer or return.

In his complaint and alternative writ the relator alleged that he was the coroner of Marion county; that, on August 8th, 1883, it became and was the official duty of the relator, as coroner, to hold an inquest upon the body of one Sophia E. Wishmier, a resident of such county, who had been found dead therein, and he had accordingly held an inquest on such body, on the day named; that the fees fixed by law for such inquest were as follows: For inquest $10, and mileage fifty cents, for the relator as coroner; that afterwards, on August 31st, 1883, the relator filed a certified statement of his fees as aforesaid with the appellant, then and since the auditor of such county, whose duty it was to draw his warrant in the relator's favor on the county treasurer for the amount of such fees; that the relator then and there demanded of the appellant that he issue such warrant in relator's favor, for the amount of his fees; but that the appellant, as such auditor, refused then and since to issue such warrant. Wherefore, etc.

It will be seen from his complaint that the relator claims it to be the duty of the county auditor to draw a warrant on the county treasurer for the payment of the expenses of an inquest, upon the mere presentation to such auditor of an account of such expenses, certified by the coroner, and his demand for such warrant. On the other hand, it is claimed by the appellant that he can not, as county auditor, under the law, draw his warrant on the county treasurer for the payment of such account until it has been "presented to the board of county commissioners," and allowed either by such board or, on appeal, by the judgment of some superior court. The question at issue between the parties has been ably and elaborately argued by their respective counsel, and if we fail to reach a right conclusion in the decision of the cause, it will not be the fault of counsel on either side.

The question mainly depends, for its proper decision, upon the construction of divers statutory provisions enacted at divers times, beginning with the R. S. 1852, and extending down to and through the enactments of the last General Assembly; at least, it requires an examination of the long line of legislation, covering in time nearly one-third of a century, in relation to the powers and duties of certain county officers, and the compensation of such officers in so far as the same is payable out of the county treasury. This examination is necessary, because while new statutory provisions, bearing upon the subject under consideration, have been enacted from time to time, there has seldom been an express repeal of the prior legislation.

The office of coroner is a constitutional office; that is, in section 2, article 4, of the Constitution of 1851, it is provided that "There shall be elected, in each county, by the voters thereof, at the time of holding general elections, a * * * coroner," who "shall continue in office two years," Section 152, R. S. 1881. The first General Assembly, after the adoption of the Constitution of 1851, passed "An act prescribing the powers and duties of coroners," approved

May 27th, 1852, which act, except sections 2, 3, 5 and 7 thereof, which have been repealed, is still in full force, save that sections 10 and 11, and section 4 as amended by the act of February 9th, 1871, have since been amended. Sections 5875 to 5892, R. S. 1881. The act of May 27th, 1852, contained no provision in relation to the fees or compensation of the coroner, for holding an inquest, nor for the payment thereof. But in "An act regulating the fees of officers," approved June 16th, 1852, the fees of a coroner for holding an inquest were fixed, and provision was made for their payment; and the same has generally been done in the several fee and salary acts since passed. Thus, in section 36 of the fee and salary act of March 12th, 1875, it is provided as follows: "The fees of coroner's inquests shall be paid out of the county treasury." 1 R. S. 1876, p. 478.

This section has never been repealed, and is the law of the State, *except* where "the amount of money and other valuables found with the dead body" may be sufficient "to defray the expenses of such coroner's inquisition and funeral expenses of said body. Section 5882, R. S. 1881. This exception has no application to the case in hand; for here the appellee's relator is seeking to get the expenses of the inquest, mentioned in his complaint and alternative writ, out of the county treasury. Section 5892 had been repealed by the fee and salary act of March 12th, 1875, and was brought by mistake into the Revised Statutes of 1881.

The appellee's relator, so far as the amount of his fees and mileage is concerned, makes his claim in this case under the provisions of "An act fixing the fees, salaries, duties, and compensation of the officers and persons named therein," etc., approved March 6th, 1883. In the first section of this act, in so far as applicable to the relator's case, it is provided as follows: "That the fees of coroners shall be as follows, to wit: For swearing witnesses and making and returning inquisition for the view of each body, for first day, $10; for each additional day, $2.50; and mileage, for each mile nec-

essarily travelled, five cents." Section 2 limits the provisions of the act "to counties containing more than forty thousand inhabitants, as evidenced by the census taken by the United States in 1880," and declares that "the laws affecting other counties, which are now in force, shall not be affected by this act." Section 3 declares an emergency, and that the act "shall be in force from and after its passage." Acts 1883, p. 127.

It will be observed that this act makes no provision for the payment of coroners' fees, for holding inquests; but such fees are still payable, under the provisions of section 36, above quoted, of the fee and salary act of March 12th, 1875, "out of the county treasury." In section 5912, R. S. 1881, in force since May 6th, 1853, it is provided that the county treasurer "shall receive all money coming to the county, and disburse the same on the proper orders issued and attested by the auditor." In section 4 of "An act in relation to county auditors," approved May 31st, 1852, it is provided as follows: "He shall examine and settle all accounts and demands chargeable against his county, which are not directed to be settled and allowed by some other tribunal or person; and for all such sums of money settled and allowed by himself, such other tribunal or person, or where the same is fixed by law, he shall issue his orders on the treasurer of the county, payable to the person entitled thereto, which orders shall be numbered, progressively, and the number, date, and amount of each, and to whom payable, and the purpose for what drawn, shall, at the time of issuing the same, be entered in a book kept for that purpose." 1 R. S. 1852, p. 150.

This section of the statute has never been expressly repealed in or by any later enactment, and it is brought forward into the Revised Statutes of 1881, as section 5896, and as an existing law. Nor can we say that the section quoted has been repealed by implication, except in this wise, that as every "legal claim against any county" must, under later legislation, be "presented to the board of county commis-

sioners," for examination and allowance, there are now no accounts or demands against the county, "which are not directed to be settled and allowed by some other tribunal or person," unless it be a salary the amount whereof is fixed, either by law or contract. In section 5758, R. S. 1881, in force since May 31st, 1879, it is provided as follows: "Whenever any person or corporation shall have any legal claim against any county, he shall file it with the county auditor, to be by him presented to the board of county commissioners." The next section, 5759, of the same act, provides that "The county commissioners shall examine into the merits of all claims so presented; and may, in their discretion, allow any claim in whole or in part, as they may find it to be just and owing."

It will be observed that under these sections of the statute, when any legal claim against any county is filed with the county auditor, it is not the duty of such auditor to settle and allow the same, but the claim is "to be by him presented to the board of county commissioners," for their examination and allowance. Accordingly, in *Board, etc.*, v. *Hon*, 87 Ind. 356, it was held by this court, and correctly so we think, that, under these statutory provisions, all claims against a county must be presented for allowance to the board of county commissioners. This is certainly the general rule, and we know of no exceptions to it, except the one already adverted to, of a salary the amount of which is fixed, either by law or contract, and the one provided for, in section 1414, R. S. 1881, of "a sum allowed, or certified to be due by any court of record authorized to use a seal and having jurisdiction beyond that of justices of the peace." The relator's claim, in the case at bar, does not come within either of these exceptions to the general rule.

Our conclusion is, therefore, that the court clearly erred in overruling the appellant's demurrer to the relator's complaint and alternative writ. This conclusion renders it unnecessary for us to consider the other error complained of.

The judgment is reversed, at the relator's costs, and the cause remanded with instructions to sustain the demurrer to the complaint and alternative writ of mandate.

Filed April 16, 1884.

No. 9858.

NORTH-WESTERN MUTUAL FIRE INSURANCE COMPANY *v.* BLANKENSHIP ET AL.

PRACTICE.—*Verdict and Special Answers.*—A motion for judgment in his favor, upon the general verdict and answers to interrogatories, made by the party against the general verdict, should be overruled.

INSANITY.—*Contract.—Mortgage by Insane Wife.—Disaffirmance by Heirs.*—To a suit to foreclose a mortgage executed by husband and wife, on his lands, both being then dead, the wife having survived the husband, the heirs of the wife answered that she was insane when the mortgage was executed and so continued during life, and that the mortgage was given to secure a debt of the husband. Reply: 1. That when the mortgage was executed the wife was apparently sane, and was never judicially declared insane, and never disaffirmed the mortgage; that the plaintiff had no notice of her insanity, and took the mortgage in good faith to secure a loan to the husband, and it had not been disavowed by the wife or her heirs; 2. Alleging the same facts, and, also, that after the date of the mortgage she was treated by her family as a sane person in all respects; that the loan, $6,000, was expended by the husband in the purchase of other lands; that the loan is wholly unpaid; that the husband died insolvent, and sale of the whole of the mortgaged lands will be required to repay the loan.

Held, that the answer was good, and both paragraphs of the reply were bad.

NEW TRIAL.—*Practice.*—Inconsistency between a general verdict and special findings is not available on motion for a new trial.

From the Owen Circuit Court.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and *E. Daniels*, for appellant.

G. W. Grubbs, J. H. Jordan and *L. Ferguson*, for appellees.

BICKNELL, C. C.—The appellant brought this suit against

the widow and heirs of Perry Blankenship, to foreclose a mortgage executed by him and his wife to the appellant.

Pending the suit, the widow died. Her heirs answered the complaint, admitting the execution of the mortgage, averring that the mortgagor owned the land in fee simple; that the mortgage was made to secure his debt only, and that Mrs. Blankenship, when the mortgage was executed, was of unsound mind, incapable of making any contract, and so remained until she died. Said heirs filed, also, a cross complaint against the plaintiff, alleging the same facts, and praying that the interest which descended to Mrs. Blankenship, in the mortgaged lands, might be declared exempt from the operation of the mortgage, and that the title thereto might be quieted in said heirs.

To said answer and to said cross complaint the plaintiff filed demurrers, which were overruled.

The plaintiff replied to the answer in three paragraphs, of which the third was the general denial. The plaintiff also answered said cross complaint in three paragraphs, of which the third was a general denial.

Said heirs demurred to the first and second paragraphs of said reply, and demurred to the first and second paragraphs of said answer to the cross complaint; and said demurrers were sustained. The cause was then tried by a jury upon the complaint, the answer of the said heirs, the cross complaint of said heirs, the reply in denial of the answer, and the answer in denial of the cross complaint. The jury returned the following verdict:

"We, the jury, find in favor of the foreclosure of the mortgage in question, as against the interests in the land in question which descended to the heirs of P. M. Blankenship other than the interest which descended to Bathsheba Blankenship; and we assess the amount due on said mortgage in principal and interest at the sum of $8,023.58, and the further sum of $240.57 as solicitors' fees, and upon the plea of insanity made by the heirs of said Bathsheba, we find for them, that

the interest in said lands descending to her is not affected by the mortgage in question."

With their verdict, the jury returned the following interrogatories submitted to them on behalf of the plaintiff, and their answers thereto:

"Question 1. How much is due the plaintiff for unpaid principal and interest on the mortgage sued on? Answer. $8,023.58 (eight thousand and twenty-three dollars $\frac{58}{100}$).

"Ques. 2. How much should the plaintiff be allowed for reasonable attorneys' fees for foreclosing the mortgage? Ans. $240.57.

"Ques. 3. What additional sum should the plaintiff be allowed for attorneys' or solicitors' fees, over and above the ordinary fee for foreclosing the mortgage, on account of the litigation caused by the defence of this action? Ans. None.

"Ques. 4. Is it established by a preponderance of the evidence, that Bathsheba Blankenship was, at the time of the execution of the mortgage sued on, a person of unsound mind? Ans. Yes.

"Ques. 5. If she is thus proved to have been a person of unsound mind, when did such unsoundness of mind begin, and how long did it continue? Ans. On or about October 7th, 1871, and continued until death.

"Ques. 6. If such unsoundness of mind is proved to have existed, to how many subjects did such unsoundness of mind relate? Ans. One.

"Ques. 7. If such unsoundness of mind is proved to have existed, and related to only one or a few subjects, state or enumerate the subjects to which it did relate. Ans. Death of her son.

"Ques 8. If such unsoundness of mind is proved to have existed at the time the mortgage was executed, did such unsoundness of mind have any relation to the execution of the mortgage? Ans. No.

"Ques. 9. If such unsoundness of mind is proved to have

existed, at the time the mortgage was executed, was the mortgage the offspring of such unsoundness of mind? Ans. No.

"Ques. 10. Did Mrs. Bathsheba Blankenship, after the execution of the mortgage, remember and recognize the fact that she had executed it? Ans. No.

"Ques. 11. Is there any evidence that Mrs. Bathsheba Blankenship was ever under guardianship as a person of unsound mind? Ans. No.

"Ques. 12. Is there any evidence that any proceedings were ever commenced in court to have her declared a person of unsound mind? Ans. No."

The jury also returned with their verdict the following interrogatories submitted on behalf of the heirs of Mrs. Blankenship, and their answers thereto:

"1. Was Bathsheba Blankenship, at the time of the execution of the mortgage in question, a person of unsound mind? Ans. She was.

"2. Did Bathsheba Blankenship continue to be a person of unsound mind until the day of her death? Ans. She did."

Upon the return of the verdict, interrogatories and answers, the plaintiff moved as follows:

"Now here comes the plaintiff and moves the court, upon the general verdict and the special findings of the jury in answer to interrogatories, to render a decree in this cause finding that there is due to the plaintiff on the foot of the mortgage sued on $8,023.58, and providing that, if said sum is not paid into court, together with the costs of suit, within ten days, or such other time as the court may appoint, with interest at six per cent. per annum from this date, on said sum of $8,023.58, all the real estate, conveyed and mortgaged by the mortgage sued on, shall be sold without relief from valuation or appraisement laws, as lands are sold on execution, and that the proceeds of such sale shall be applied first to the payment of the costs of this suit, and then to the payment to the plaintiff of said sum of $8,023.58, and interest aforesaid, and that, by the decree so to be entered, the equity

of redemption of all the defendants to this suit may, from and after the sale of the mortgaged premises, be forever barred and foreclosed as to all of the defendants, except only as to the statutory right of redemption from such sale within one year from the day of sale."

This motion was overruled by the court, and judgment was rendered upon the general verdict as follows:

"It is ordered, adjudged and decreed that the following real estate, situated in Morgan county, Indiana, and described in the mortgage sought to be foreclosed in this action, owned by the said Bathsheba Blankenship in her lifetime, is not liable to be sold under the decree of foreclosure to be rendered in favor of the plaintiff herein, but is hereby decreed to be exempt from sale to pay the said sum so found by the jury to be due the plaintiff on the foot of its mortgage; which said tract of land is described as follows:" Then follows a description of said land, and a decree quieting the title thereto of the heirs of Bathsheba Blankenship, and awarding costs to them against the plaintiff, and foreclosing the mortgage as to all the other land mentioned therein, and ordering that the same be sold, and the proceeds applied in payment of the costs of the suit, except those decreed against the plaintiff, and then to the payment of the mortgage debt and interest.

The plaintiff excepted to that part of the judgment which exempted the land owned by Bathsheba Blankenship in her lifetime, and quieted the title thereto in her heirs, and decreed costs in favor of said heirs against the plaintiff.

The plaintiff moved for a new trial. This motion was overruled. The plaintiff appealed, assigning the following errors:

1. Overruling the appellant's motion for judgment on the general verdict, and on the special findings of the jury in answer to special interrogatories, for the amount found by said general verdict, and for the sale of all the mortgaged premises conveyed by the mortgage sought to be foreclosed, and

for the application of the proceeds of the sale to the satisfaction of such judgment.

2. In rendering the decree set out by the record instead of rendering the one so moved for as aforesaid by the plaintiff.

3. In sustaining the demurrer of said heirs to the first paragraph of the appellant's answer to the cross complaint of said heirs.

4. In sustaining the demurrer of said heirs to the second paragraph of appellant's answer to said cross complaint.

5. In sustaining the demurrer of said heirs to the first paragraph of the plaintiff's reply to their answer.

6. In sustaining the demurrer of said heirs to the second paragraph of the plaintiff's reply to their answer.

7. In overruling the motion for a new trial.

The first and second of these alleged errors may be considered together.

Where the special findings are inconsistent with the general verdict, the proper motion is for judgment upon the findings notwithstanding the verdict; where the special findings support the verdict, or are not irreconcilably inconsistent therewith, the judgment is rendered upon the verdict; where the findings are in conflict with each other, judgment must be rendered on the verdict. *Byram* v. *Galbraith*, 75 Ind. 134; *Indianapolis, etc., R. R. Co.* v. *McCaffrey*, 62 Ind. 552; *Scheible* v. *Law*, 65 Ind. 332.

The motion here was not for judgment upon the special findings notwithstanding the verdict; it was for "judgment for the plaintiff on the general verdict and on the special findings." There was no error in overruling that motion; such a motion is not authorized by the statutes. R. S. 1881, sections 546, 547.

The only reason for a judgment on the special findings is that they are contrary to, and, therefore, control the general verdict; but here the motion was for judgment upon both. In such a case, it was proper to render judgment upon the general verdict. *Mitchell* v. *Geisendorff*, 44 Ind. 358.

The plaintiff's counsel, in their brief, say, that "the third, fourth, fifth and sixth assignments of error are intended to present the same question, and may be considered together."

Upon the statement in the first paragraph of the answer of Mrs. Blankenship's heirs, the presumption is that she was never judicially declared to be of unsound mind. *Hardenbrook* v. *Sherwood*, 72 Ind. 403. Her mortgage, therefore, was not void but voidable; but the answer shows that she had no power to disaffirm it, because her disability lasted all her lifetime; her heirs, therefore, in an action against them to enforce the mortgage, could take advantage of such a continuing disability, disaffirm the contract and have the mortgage avoided. *Somers* v. *Pumphrey*, 24 Ind. 231; *McClain* v. *Davis*, 77 Ind. 419; *Musselman* v. *Cravens*, 47 Ind. 1; *Freed* v. *Brown*, 55 Ind. 310; *Wray* v. *Chandler*, 64 Ind. 146; *Hardenbrook* v. *Sherwood*, *supra*. Under these authorities the answer presented a good defence. No error, however, is assigned upon the overruling of the demurrer to this answer, nor upon the overruling of the demurrer to the cross complaint.

The first paragraph of the plaintiff's reply to said answer avers that Mrs. Blankenship, before and at the time the mortgage was executed, was apparently a person of sound mind, and had never been judicially declared to be insane or placed under guardianship, and was never afterwards so declared; that plaintiff took the mortgage in good faith, in the ordinary course of business, to secure its loan to Perry Blankenship, having no knowledge, information, belief or suspicion that she was of unsound mind; that she, in her life, never attempted to disaffirm the mortgage, and that her heirs have made no such effort, except the filing of said answer.

The second paragraph of plaintiff's reply to said answer avers the same facts as the first paragraph, and, also, that Perry Blankenship and his family, at and before and after the date of the execution of the mortgage, treated Mrs. Blankenship as a person of sound mind, allowed her to go unattended, and

to transact such business, including joining with her husband in conveyances of land, as married women of sound mind, in her station in life, are accustomed to transact; that said Perry expended the $6,000 loaned to him upon said mortgage in the purchase of other real estate, while Mrs. Blankenship was his wife; that none of said money has been refunded to the plaintiff; nor has plaintiff been in any way restored to the position it held before said mortgage and loan were made; that said Perry, although solvent at the date of the mortgage, died insolvent, and that the sale of all the mortgaged property will be required to pay the mortgage debt.

In *Somers* v. *Pumphrey, supra,* Elizabeth Somers had made a deed of land to plaintiffs, her heirs at law, to whom the land descended, brought the suit to set aside the deed, alleging that their ancestress, when she executed it, was of unsound mind. The plaintiffs in that suit occupied substantially the same position as the defendants in this; they were heirs seeking to avoid the contract of their ancestress because of her insanity. The defendants in that case had asked the court below for the following instruction: "That if the defendants held the land in controversy by deed from Golvin Somers, and paid him a valuable consideration for it, not knowing, at the time of their purchase, that the said Elizabeth Somers was of unsound mind at the time she executed the deed to Stineman, * * the plaintiffs can not recover."

This court held that said instruction was correctly refused, and said: "The authorities are not uniform as to the effect, in various cases, that may be given to the contracts of persons who are of unsound mind at the time of making them. The general rule, however, applicable to contracts of the character of that under discussion here, seems to be settled, that such contracts may be avoided, either by the persons themselves, or their legal representatives."

The court also said that the case seemed to be analogous to the contract of an infant, and cited the case of *Doe* v. *Abernathy,* 7 Blackf. 442, where it was held that an infant's deed

might be avoided by his heirs, although the land had passed into the hands of a *bona fide* purchaser for a valuable consideration.

In the case of *McClain* v. *Davis, supra,* where the application to avoid the contract was made by the guardian of the insane person, this court said: "The duly appointed guardian may, of course, exercise the right of disaffirmance. There was nothing received, * * of which it can be said that restitution should be made. * * Commercial paper is not an exception to the rule which permits a disaffirmance by any one who was of unsound mind at the time of becoming a party thereto. The purchaser of such paper takes with constructive notice of all legal disabilities of the parties, such as infancy, coverture, and unsoundness of mind."

In *Musselman* v. *Cravens, supra,* where the action was upon a note, and the defence was the insanity of the maker, the reply was, that the maker was apparently of sound mind and not known by the payees to be otherwise; that he had recently been adjudged sane by a jury; that the note was a subscription to build a college, and that the payees, on the faith of it, had incurred debts and liabilities, and could not now be placed *in statu quo,* it was held that this reply was not sufficient. This case was decided in 1874.

The case of *Harbison* v. *Lemon,* 3 Blackf. 51 (23 Am. Dec. 376), was a bill to foreclose a mortgage, brought against the heirs of the mortgagor. The defence was the incapacity of the ancestor to make a contract. The court said: "It is not the mortgagor himself, but his heirs, that are the defendants in this case; and it was never denied but that the heirs might avoid the bond of their ancestor, on the ground of his incapacity to contract. Co. Litt. 247; *Beverley's Case,* 4 Co. Rep. 123."

The fundamental principle of the law on this subject is that, assent being essential to a contract, a man incapable of assent is incapable of contracting. The cases heretofore cited show that, as a general rule, some exceptions to which will

be presently stated, when a contract is made by an insane person who remains insane continually thereafter until his death, and an action is then brought against his heirs to enforce it, they may by a proper pleading disaffirm the contract, and that it is not a good reply to such a pleading, that the party was apparently of sound mind; nor that he had not been judicially declared insane; nor that the other party contracted in good faith, and without suspicion of insanity, nor that no previous effort had been made to disaffirm the contract; nor that the family of the insane person had permitted him to go unattended and transact ordinary business.

Where an insane wife has joined in a mortgage of her husband's lands to secure his debt, it is not a good answer to such a pleading, as aforesaid, that she and her heirs have never refunded money which she never received, and have done nothing to place the other party *in statu quo.*

The paragraphs of the answer to the cross complaint, and of the reply to the answer in this case, were pleaded together with general denials; if any of the facts alleged tended to show that Mrs. Blankenship was not insane, they could have been given in evidence under the general denial. There was no error in sustaining the demurrers to the first and second paragraphs of the plaintiff's reply to the answer of the heirs. And there was, for the same reasons, no error in sustaining the demurrers to the first and second paragraphs of the plaintiff's answer to the cross complaint of said heirs.

The general rule is that a contract made by a person of unsound mind may be disaffirmed by him or by his representatives. But in modern times this rule has been subject to an exception in cases where the consideration of the contract is fair, and has actually been received and used by the lunatic, the other party honestly dealing with him as a sane man, and having no knowledge of the unsoundness of mind.

This exception was first recognized at common law in the case of *Bagster* v. *Earl of Portsmouth,* 7 Dow. & Ry. 614, where a tradesman having furnished necessaries to a lunatic,

without being aware of his infirmity, was permitted to recover their value.

The exception has been extended to cases where the articles received and used by the lunatic were not actually necessaries, although beneficial to the lunatic; but where nothing is received by the lunatic the reason for such exception does not exist.

It was held in *Wilder* v. *Weakley*, 34 Ind. 181, that where goods are sold to a person apparently of sound mind, who is not known by the seller to be otherwise, and has not been judicially declared to be of unsound mind, and the contract is fair and *the lunatic receives and uses the goods*, there is no reason in law or sound morals why he, or his estate, should not pay what the goods are reasonably worth. The difference, however, between such a case and the case at bar is manifest. See *Musselman* v. *Cravens*, *supra*.

The real ground of the exception under consideration is that where a lunatic has actually had the use of the entire consideration of his contract, he ought to pay for it. In Story's Equity Jurisprudence, sections 227, 228, the statement is: "So, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage had been taken of the party, courts of equity will not interfere."

In Chitty on Contracts (11th ed.), 191, it is said: "In like manner, it has been decided, that where a person apparently of sound mind, * * enters into a contract for the purchase of property, * * and the subject-matter of the contract has been paid for and fully enjoyed," etc., "such contract can not be set aside, either by the alleged lunatic, or by those who represent him."

In Addison on Contracts, p. 149, the principle is thus stated: "An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages, or servants, can not be defeated," etc., "for the law will not permit the lunatic's infirmity to be made an instrument of fraud."

The theory of these elementary writers is that where the lunatic has received and had the benefit, the contract being fair, and made *bona fide*, without knowledge of the lunacy by the other party, it would be unconscionable to refuse to enforce it.

So, in *Fay* v. *Burditt*, 81 Ind. 433 (43 Am. R. 142), the same principle was held to apply where the lunatic, being a farmer, had rented and enjoyed the use of a farm for a year, and had given his note for the rent. It was there held that the court below had properly charged the jury that the voidable contracts of insane persons not under guardianship will be enforced or not enforced by courts, according to the circumstances of the case. There is no analogy between any of the foregoing excepted cases and the case at bar. Here nothing was received by the insane woman, and it would be inequitable to hold her bound by a mortgage executed for the sole benefit of her husband, she having no contracting mind. The insane are under the protection of courts, and ought not to be bound by contracts not beneficial to them, to which they never assented and could not assent. The case of *Fay* v. *Burditt*, *supra*, was rightly decided. The points there decided were: 1. That the contracts of an insane person, not judicially declared to be such, are voidable and not void. 2. That the plaintiff ought to recover on a note given by such a lunatic, being a farmer, for the rent of a farm used and occupied by him for the support of himself and family, he having been apparently of sound mind, and his unsoundness not being known to the other party, and the contract being fair.

The case was clearly within the exceptions. But the following language appears in the opinion rendered in *Fay* v. *Burditt*, *supra*, to wit: "It is manifest that a person of unsound mind, whose incapacity has not been judicially determined, can not, with a due regard to the rights of others, be permitted, like an infant (except as to necessaries) or a married woman, to exercise the privilege of disaffirming his con-

tracts, irrespective of their character and the circumstances under which they were made. Every person may well be on his guard as to whether he is dealing with a married woman, or an infant; but not so as to the insane who afford no outward sign of their incapacity."

This language was not necessary for the points decided, and was not in accordance with previous rulings of this court.

In *Somers* v. *Pumphrey, supra,* on page 238, this court said: "If the person is *non compos mentis,* there is a want of capacity to contract; he does not, in a legal sense, consent, because there is a want of that mental capacity essential to a legal consent. In this respect, the case seems analogous to the contract of an infant, * * and it has been held that a deed made by an infant might be avoided by his heirs, though the estate had passed into the hands of a *bona fide* purchaser, for a valuable consideration. *Doe* v. *Abernathy,* 7 Blackf. 442."

In *McClain* v. *Davis, supra,* this court said: "The purchaser of such paper takes with constructive notice of all legal disabilities of the parties, such as infancy, coverture, and unsoundness of mind."

It was well said by the learned judge who delivered the opinion in *Fay* v. *Burditt, supra,* "These subjects, however, must be regarded as open for further consideration, as the questions may arise. They are not directly involved here."

The latest case in relation to the exception now under consideration is *Copenrath* v. *Kienby,* 83 Ind. 18. It was there held, in accordance with the cases hereinbefore referred to, that it was a good reply to an answer of insanity pleaded by the mortgagor in a foreclosure suit, that the mortgage was given to secure the repayment of money obtained for the use and benefit of the mortgagor, and which was used and applied for his benefit in payment of a *bona fide* debt, and that the mortgagee lent the mortgagor money and took said mortgage *bona fide* without knowledge of such insanity. But further it may be observed that Mrs. Blankenship occupied

a position closely analogous to that of a surety. *Leary* v. *Shaffer*, 79 Ind. 567; *Grave* v. *Bunch*, 83 Ind. 4.

Occupying such a position, and being also insane, she was eminently entitled to the protection of the court, and her rights ought to be enforced in favor of her heirs.

The seventh and last error assigned is overruling the motion for a new trial.

The reasons assigned for a new trial are:

1. The verdict is contrary to law.

2. The verdict is not supported by, but is contrary to, the evidence.

3. The verdict is inconsistent with the special findings in answer to plaintiff's interrogatories.

The question as to inconsistency between the verdict and the special findings is not presented by a motion for a new trial. *Stockton* v. *Stockton*, 40 Ind. 225. It can be presented only by a motion for judgment upon the special findings, and by an assignment of error upon the overruling of such motion. *Horn* v. *Eberhart*, 17 Ind. 118; *Byram* v. *Galbraith*, *supra*. A motion for judgment upon part of the special findings only, or upon the answers to the interrogatories of one only of the parties, when there are answers to interrogatories of other parties, can not prevail. *Byram* v. *Galbraith*, *supra*. Such inconsistency between the verdict and the special findings is not presented by the first and second reasons alleged for a new trial. *Horn* v. *Eberhart*, *supra*.

Where, as in this case, the evidence is not in the record, no question as to the evidence is presented by the motion for a new trial. *Williams* v. *Potter*, 72 Ind. 354; *Kerwin* v. *Myers*, 71 Ind. 359; *Early* v. *Hamilton*, 75 Ind. 376.

The verdict was not contrary to law, and there was no error in overruling the motion for a new trial, and there is no available error in the record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing

opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 3, 1884. Petition for a rehearing overruled April 17, 1884.

No. 10,566.

JEWETT ET AL. *v.* THE STATE, EX REL. HARROD.

COUNTY CLERK.—*Liability of his Sureties for County Order Converted by him.—Statute Construed.*—A county order, paid into the hands of a county clerk under the order of the proper judge, comes within the meaning of the word "funds" in section 5850, R. S. 1881, and, under that section, such clerk and his sureties are liable to the person entitled to such county order, upon the refusal of the clerk to account for or deliver it to such person.

From the Scott Circuit Court.

C. L. Jewett and *H. E. Jewett*, for appellants.

C. B. Harrod, for appellee.

NIBLACK, J.—At the general election held in October, 1876, Newton M. Wilson was elected clerk of the Scott Circuit Court, and, on the 17th day of November, in the same year, he executed an official bond and took the oath of office as such clerk. His official bond was signed by Matthias E. M. Hoagland, Dexter McClure, John H. McFadden, John W. Rice, William Wilson, John H. Sommerville, Benjamin Phillips and Charles L. Jewett as his sureties.

On the 19th day of March, 1877, the said Wilson entered upon his duties as such clerk, and served for the term of four years.

This was an action against him and his sureties on his official bond by William G. Harrod, the administrator of the estate, unadministered, of Henry M. Wilson, deceased, a former clerk of the Scott Circuit Court: *First*, for the conversion of certain fees and costs due to the decedent, alleged to have been collected by the said Newton M. Wilson while

in office. *Second.* For the alleged conversion of certain notes, accounts, choses in action and a county order belonging to the estate of the decedent, which had been deposited with him, the said Newton M. Wilson during his term as clerk by order of the said Scott Circuit Court.

The sureties only appeared to the action, and issue being joined between them and the plaintiff, the court trying the cause made a finding for the plaintiff, and assessed the relator's damages at $159.28. A motion for a new trial, challenging the sufficiency of the evidence, having been first denied, judgment was rendered upon the finding.

It was satisfactorily established at the trial that while he was holding the office of clerk as above stated, the said Newton M. Wilson received fees due to his predecessor, Henry M. Wilson, amounting to the sum of $61.28, which he converted to his own use; also, that during the said Newton M. Wilson's term as such clerk, one Samuel S. Crowe was the administrator of the estate of Henry M. Wilson, then deceased, acting within the jurisdiction of the Scott Circuit Court; that said Crowe, not having fully administered such estate, had remaining in his hands, as assets belonging to the same, certain notes, accounts, choses in action, and a warrant drawn by the auditor upon the treasurer of Scott county, commonly known as a "county order," for $98; that upon a report showing the condition of the estate, and at the request of said Crowe, the court ordered that he, as such administrator, should turn over said notes, accounts, choses in action and county order to the said Newton M. Wilson as clerk, and that he, the said Crowe, should thereupon be discharged from the administration of the estate; that said Crowe at once delivered over said notes, accounts, choses in action and county order to the said Wilson as such clerk, who executed a receipt for the same, and Crowe was accordingly discharged; that Harrod, the relator, had succeeded Crowe in the administration of the said Henry M. Wilson's estate, and had, since the expiration of the said Newton M. Wilson's term as clerk, in connection with other mat-

ters, demanded from him the county order so delivered to him by Crowe; that he, the said Wilson, denied having ever had said order, and refused to deliver the same to the relator, and had never accounted for such order to any one entitled to receive it; that said order was of the value of $98.

It is certified to us through the bill of exceptions, that the value of this county order was taken into account in making up the amount of the damages assessed in favor of the relator, and the decision of the circuit court in that respect was assigned as a cause for a new trial, upon the theory that the sureties of a clerk are only responsible for *money* paid into court by its order, and that a county order is in no sense money within the meaning of the first section of the act of March 9th, 1875, conferring additional authority upon the clerks of the several courts of this State in certain respects.

The section of the act of 1875 referred to is now known as section 5850, R. S. 1881, and is as follows:

"The clerks of the several courts throughout this State are hereby authorized to receive money in payment of all judgments, dues, and demands of record in their respective offices, and all such funds as may be ordered to be paid into the respective courts of which they are clerks, by the judges thereof; and said clerks, with their sureties, shall be liable on their official bonds for all moneys so received by said clerks, and so paid into such courts under the order of the judges thereof, to any person who may be entitled to demand and receive such money or funds from them."

By this section of the statute, and under the order of the Scott Circuit Court, Wilson, the clerk, was authorized to receive from Crowe any of the *funds* in his hands belonging to the estate of Henry M. Wilson. The word "funds," as used in the connection in which we find it as above, has evidently a much broader meaning than is ordinarily applied to the word "moneys," and while the two words are often used as convertible terms, the former is much more than the equivalent of the latter.

A *fund* may be denominated a deposit or accumulation of resources from which supplies are drawn, out of which expenses are provided, or which may be available for the payment of debts or the discharge of liabilities. The assets of an estate constitute a *fund* in the hands of the executor or administrator, which, in certain cases, he may be required to bring into court. There are, however, many kinds of assets which it would be both unsuitable and impracticable to bring into court. We must, therefore, construe the section of the statute, above set out, as meaning that a clerk is only required to receive into his custody such articles of property as either constitute money or the representative, or in some sense the equivalent, of money, and as may be conveniently kept and taken care of by him. What the courts may or may not ordinarily, or otherwise, require to be paid into court, is a question we need not fully consider at the present hearing. It is sufficient for our present purpose to hold that whatever funds, or fragmentary part of a fund, a clerk may be required to take into his custody by order of court, he and his sureties are responsible for on his official bond.

The county order in controversy purported to be the representative of a fixed value in money, and possessed some of the attributes of a paper currency used as the equivalent of money. It was, in addition, a component part of a fund in the hands of Crowe in his fiduciary capacity, and within the jurisdiction of the Scott Circuit Court. It had, consequently, all the essential characteristics of a fund, or part of a fund, which might be ordered to be paid into court, and for which Wilson, as clerk, might be held liable on his bond.

The court below did not, therefore, as we conclude from the evidence, err in taking the value of this county order into account in assessing the relator's damages.

The judgment is affirmed with costs.

Filed Jan. 10, 1884. Petition for a rehearing overruled April 17, 1884.

No. 11,328.

LOWE v. BOARD OF COMMISSIONERS OF HOWARD COUNTY.

PUBLIC SQUARE.—*Street Assessment.*—*County.*—The public square of a county can not be sold on a precept to pay an assessment for a street improvement.

From the Howard Circuit Court.

J. W. Kern, M. Bell and *W. C. Purdum,* for appellant.

M. Garrigus, for appellee.

ELLIOTT, J.—The ruling question in this case is this: Can the public square of a county be sold on a precept issued on an assessment levied for the cost of improving a street?

The term "public square" has acquired a legal meaning, and courts adopt that meaning in all cases where the term is not shown by the language with which it is associated to have a different signification. The public square of a county is property of a public nature, held for governmental or public purposes. *Westfall* v. *Hunt,* 8 Ind. 174; *Com.* v. *Bowman,* 3 Pa. St. 202; *Langley* v. *Gallipolis,* 2 Ohio St. 107.

The general rule is that the property of a public corporation held for public or governmental purposes can not be sold under any legal process. Property of this description can not be sold on execution. *President, etc.,* v. *City of Indianapolis,* 12 Ind. 620; 2 Dillon Mun. Corp. (3d ed.), section 576. Laws creating liens in favor of mechanics do not operate on the public property of municipal corporations. *Board, etc.,* v. *O'Conner,* 86 Ind. 531 (44 Am. R. 338); 2 Dill. Mun. Corp., section 577; *Board, etc.,* v. *Norrington,* 82 Ind. 190; *Leonard* v. *City of Brooklyn,* 71 N. Y. 498; S. C., 27 Am. R. 80. Lands held by public corporations for public purposes are exempt from taxation. *Worcester Co.* v. *Worcester,* 116 Mass. 193. These examples sufficiently show that public property can not be seized for debts due from the public corporation, and the reason of the rule applies quite as forcibly to seizures for street assessments as to seizures under any other

legal process. The rule rests on the principle that the public good requires that property needed for the proper administration of local governmental affairs shall not be taken from the local authorities, lest the due administration of such affairs be so much disturbed as to cause the public to suffer. It is obvious that this principle applies as well to seizures under precepts as to seizures under ordinary legal process. There is still another reason for the rule, and that is the danger that public property would be sacrificed at forced sales, because there is no one having a direct personal interest in protecting it, and, therefore, no one directly interested in either preventing a sale or in taking measures to make the property sell for its fair value. It is evident that whatever be the true reason for the rule, public policy requires that the public property of counties should not be sold on either ordinary or extraordinary legal process.

It is true that the statute is very broad in its terms and contains no exceptions, but it is also true that such statutes must be read by the light of the general principles of the law. It is not to be expected that the Legislature will mark out particular instances, but that they will lay down general rules. The statutes giving liens to mechanics, and the statutes creating judgment liens, are broad and comprehensive and free from exceptions, and yet it has never been supposed that these statutes operate upon the public property of counties or cities. Statutes of such a character are to be understood as operating upon property subject to ordinary legal process and not upon property devoted to public use. 2 Dill. Mun. Corp. (3d ed.), sections 577. A forcible illustration of the principle under immediate discussion is supplied by the case of *First Presbyterian Church* v. *City of Fort Wayne*, 36 Ind. 338 (1 Am. R. 35), where it was held that an assessment for the improvement of a street can not be laid upon property owned by a church. If the property of a church is not within the statute, certainly that of a county needed for governmental purposes can not be. While an assessment for improving a street is not in a strict sense a tax, yet it so far partakes of the nature of a tax as

makes it operative only upon property subject to taxation. This is really the theory upon which the case referred to proceeds, and it well comports with our Constitution and our statutes, which everywhere evince an intention to relieve from taxes and assessments property owned by the public and by religious bodies. Judgment affirmed.

Filed April 17, 1884.

No. 11,415.

CAIN ET AL. *v.* GODA.

PRACTICE.—*Supreme Court.—Assignment of Error.*—One of two co-parties may alone assign error after notice of his appeal, a joinder in error and a written agreement of submission filed by the parties.

SAME.—*New Trial.—Evidence.*—A reason for a new trial, on account of the admission of evidence, must specify what the evidence was; a reference to a bill of exceptions not then made or filed is not sufficient.

SAME.—*Harmless Error.*—The Supreme Court will not reverse a judgment on account of the admission of immaterial evidence.

From the Pulaski Circuit Court.

G. Burson and —— *Mattingly*, for appellants.

N. L. Agnew, for appellee.

BICKNELL, C. C.—The appellee recovered a judgment against all the appellants for damages for an assault and battery. Christopher Cain, Sr., appealed, and caused notice of the appeal to be served upon his co-defendants; he then assigned errors in his own name alone, and after joinder in error the cause was submitted on the written agreement of the parties. In such a case, the errors are well enough assigned in the name of Christopher Cain, Sr. *Ridenour* v. *Beekman*, 68 Ind. 236.

The error assigned is the overruling of the said Christopher Cain's motion for a new trial. The reasons for a new trial are:

1. That the court, over the objection of said Cain, Sr.,

permitted the plaintiff to prove the value of said defendant's property.

2. That the finding of the court is not sustained by sufficient evidence.

3. That the finding of the court is contrary to the evidence and contrary to the law.

The motion for a new trial does not state what the evidence was, nor what objection was made to it, nor whether the value stated was large or small. The motion was made on the 5th of October, but no bill of exceptions was made part of the motion, or referred to therein. On the 6th of October the following bill of exceptions was filed: "Be it remembered, that upon the trial of this cause the defendant introduced one William Cain as a witness, who testified on the part of the defendant as to admissions made by the plaintiff, as to who had inflicted the injury upon him, and that said witness testified to no further facts. That the court thereupon, and upon the cross-examination of said witness by the plaintiff, permitted said witness to testify as to the value of the personal and real property of the defendant Christopher Cain, Sr., over the objections of the defendant. To which ruling of the court the defendant then and there at the time excepted." This bill of exceptions does not specify what the evidence was, nor what the objection to it was. This court has repeatedly held that a reason for a new trial on account of the admission of evidence must specify what the evidence was, and that if the motion be insufficient in this respect, a reference therein to a bill of exceptions not then made or filed will not cure the defect. *Meek* v. *Keene*, 47 Ind. 77; *Bowman* v. *Phillips*, 47 Ind. 341; *Watt* v. *De Haven*, 55 Ind. 128; *Coryell* v. *Stone*, 62 Ind. 307.

In the present case there is a general bill of exceptions, which shows that the witness William Cain did not testify as to the value of any property. The bill states as follows: "Cross-examined, William Cain testified. Question. Has your father a farm? Answer. Yes, 160 acres. Question.

Has he other proper property on the farm? Answer. Has stock and other property." There was no question as to value, and no answer as to value. If the admission of this testimony had been made a reason for a new trial in the proper form, and the objections thereto had been properly made, that it was not proper cross-examination, and was irrelevant and immaterial, even then an error in admitting such testimony would not warrant a new trial, because the fact that the defendant had a farm and personal property on it could not possibly affect the finding of the court. It was altogether immaterial. *City of Aurora* v. *Cobb*, 21 Ind. 492; *McDermitt* v. *Hubanks*, 25 Ind. 232; *Sparks* v. *Heritage*, 45 Ind. 66.

The first reason for a new trial can not be sustained.

As to the second and third reasons for a new trial, there was evidence tending to support the finding. In such a case, this court can not disturb the finding on account of conflicting testimony. *Hall* v. *Stanley*, 86 Ind. 219. Where the evidence on one side is contradicted by that given on the other side, we are to take as true that which the trial court by its finding declared to be true, per ELLIOTT, J. *Arnold* v. *Wilt*, 86 Ind. 367. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is hereby, in all things, affirmed, at the costs of the appellant.

Filed April 17, 1884.

No. 11,192.

CUNNINGHAM, ADMINISTRATOR, *v.* CUNNINGHAM.

MASTER COMMISSIONER.—*Report of.—Evidence.—Record.—Supreme Court.—Exception.*—Where the evidence is not in the record, no question is presented to the Supreme Court by an exception to the report of a master commissioner, questioning the correctness of its findings.

SAME.—*Failure to Report Evidence.*—Where the order of reference to a master commissioner does not require him to report the evidence, an excep-

tion on the ground that he had failed to report such evidence is not available.

SAME.—*Bill of Exceptions.*—In such case, a party may make the evidence part of the record by a bill of exceptions signed by the master commissioner.

DECEDENTS' ESTATES.—*Insolvent Estate.—Priority of Claims.—Widow's Rights.—Administrator's Liability.—Exceptions to Report.*—Where the administrator of an insolvent estate pays out the assets upon general debts, leaving unsatisfied a preferred claim allowed to the widow and also a mortgage upon her interest in the real estate, existing in the decedent's lifetime, he is liable to her, and she may except on these grounds to his final report.

SAME.—*Reference to Master Commissioner.—Judicial Act.*—Notwithstanding the repeal of so much of section 2391, R. S. 1881, as authorizes the reference of the final report of an administrator to a master commissioner, such reference may be made by the court, with the consent of the parties, and, though he can not exercise judicial powers, he may report his findings and conclusions of law to the court.

From the Harrison Circuit Court.

B. P. Douglass and *S. M. Stockslager*, for appellant.

S. J. Wright, for appellee.

HAMMOND, J.—The appellant, as administrator of the estate of William Cunningham, deceased, filed his report, with vouchers, in the court below for the final settlement of the estate. It appears from the report that the estate was settled as insolvent, and that the appellant paid on claims against it $153.58 in excess of assets which came to his hands. The report also showed that there was a balance unpaid upon a mortgage on land, which had been executed by the decedent and his wife for purchase-money; and also an unpaid claim allowed the decedent's widow for money advanced by her to the administrator to aid the settlement of the estate. This mortgage and claim, the administrator stated in his report, could not be paid, as all the assets of the estate were exhausted.

The appellee, who is the widow of the decedent, filed her exceptions to the report, objecting to its confirmation, on the grounds, as she charged, that a sufficiency of assets came to

the administrator's hands to pay all claims against the estate except the general debts; that the claim referred to as allowed her was one that should have been paid before the general debts; that the mortgage mentioned, upon which there was a balance due of about $400, was upon real estate which had been assigned to her as the decedent's widow; and that the administrator, instead of paying her claim and discharging her land from the mortgage, had used money of the estate sufficient to have paid said claim and mortgage in the payment of general debts. She further averred in her exceptions that the administrator had failed to charge himself with interest collected on claims due the estate, and had paid claims that were not valid demands against it. The final report and exceptions to it were filed a short time before the decedents' act of 1881 went into force. Soon after that act took effect, the court, by consent of parties, made an order referring the final report and vouchers to a master commissioner "for his examination and finding thereon, and that said master commissioner proceed to hear said final settlement account and vouchers, and report his finding thereon in writing to this court at its next term, for its action." At the following term the master commissioner made his report, containing a special finding of facts, with conclusions of law thereon. Respecting the mortgage and the appellee's claim, the facts were found as stated in her exceptions, except that the administrator was entitled to a credit on the claim for taxes paid on the appellee's land after the death of the decedent. It was also found that the administrator had paid on general debts, out of the assets of the estate, an amount more than sufficient to have paid the balance on said mortgage and claim. The mortgage referred to was executed to, and held by, one Fulenwider. The conclusions of law, as stated in the report of the master commissioner, were as follows:

"Upon the whole case, I find that the final settlement of the administrator ought not to be approved, and that he ought not to be discharged in accordance with the prayer thereof;

that he ought to pay to Robert H. Fulenwider the amount remaining unpaid on his mortgage debt, or pay into court a sum sufficient to pay the same, and that he ought to pay to Mary Cunningham, the widow, the amount of her preferred claim as allowed against said estate, less $35.71, her portion of the taxes, which would be $97.60, with interest from the date of said allowance; these two items being less in amount than was paid out by said administrator on unpreferred claims. I further find that the administrator ought to pay the costs of this proceeding. (Signed) W. M. TRACEWELL,
"Master Commissioner."

The appellant filed six exceptions to the master commissioner's report. The first, second and third of the exceptions questioned the correctness of certain facts specially found. The fourth exception to the report was the failure of the master commissioner to present the evidence upon which his findings were based. The fifth and sixth exceptions were to the conclusions of law. The court overruled the exceptions, and entered judgment directing the appellant, as such administrator, to file another report for final settlement in accordance with the report of the master commissioner. The court also gave the appellee judgment for costs.

The first, second and third of the appellant's exceptions to the master commissioner's finding of facts present no question. The evidence not being in the record, we must presume that such finding was correct. Nor does the appellant's fourth exception present any question. The order of reference did not require the master commissioner to report the evidence. Had such order required him to report the evidence, a bill of exceptions embracing such report would have made the evidence part of the record. And even without such requirement in the order of reference, the appellant could, had he chosen to do so, have brought the evidence in the record by bill of exceptions signed by the master commissioner. *Lee* v. *State, ex rel.*, 88 Ind. 256. The absence of the evidence from the record furnishes no ground for complaint.

The master commissioner did not err in his conclusions of law, nor was there error in overruling the exceptions thereto. Section 109 (2 R. S. 1876, p. 534) of the decedents' act of 1852, which governed the payment of claims in this case, provided that claims against the estate of a decedent should be paid in the following order:

"*First.* Expenses of administration; *Second.* Expenses of last sickness, and funeral expenses; *Third.* Judgments which are liens upon the decedent's real estate, and mortgages of real and personal property existing in his lifetime; *Fourth.* General debts. *Fifth.* To legatees; *Sixth.* To distributees."

The mortgage and the claim of the appellee, referred to in her exceptions and in the report of the master commissioner, should have been paid before the payment of general debts. An executor or administrator should not in his final settlement receive credit for payment on the general debts until claims having preference are paid. Where the law fixes the order for the payment of claims, it should be pursued; otherwise the loss, if any, to a preferred claimant must fall upon the executor or administrator who pays a claim out of its order. It is the widow's right to have her interest in the lands of her deceased husband discharged from a mortgage existing at the time of his death, before the payment of general debts. *State, ex rel.*, v. *Mason*, 21 Ind. 171; *Perry* v. *Borton*, 25 Ind. 274; *Hunsucker* v. *Smith*, 49 Ind. 114; *Morgan* v. *Sackett*, 57 Ind. 580; *State, ex rel.*, v. *Kelso*, *post*, p. 587.

It is insisted that the appellee's remedy was by action on the administrator's bond, rather than by exceptions to his final report, for disregarding, to her prejudice, the order of payment of claims. No doubt the remedy on the bond exists, if the judgment of the court below is not complied with. At the same time, however, it was necessary for the appellee to object to the administrator's final report, for had it been approved by the court, it would, until set aside for fraud or mis-

take, have been conclusive against an action on the bond. *State, ex rel.*, v. *Kelso, supra.*

Again, it is objected to the proceedings that the master commissioner acted without authority of law. Section 2391, R. S. 1881, prior to its amendment (Acts 1883, p. 161), expressly authorized the reference of the administrator's report to a master commissioner; and, without such statute, we suppose the reference could have been made, as was done in this case, by consent of parties. A master commissioner, as was decided in *Shoultz* v. *McPheeters*, 79 Ind. 373, may not exercise judicial powers, yet, as was said in that case, "The power to hear causes and report facts or conclusions to the court for its judgment is not judicial within the meaning of the Constitution."

Our conclusion is that there is no error in the record. Judgment affirmed, at the personal costs of the appellant.

Filed April 18, 1884.

No. 11,068.

94 562
127 413

94 562
165 152

94 562
168 93

MATHIS v. THE STATE.

CRIMINAL LAW.—*Indictment.—Motion to Quash.—Plea in Abatement.*—Where the sufficiency of an indictment is questioned, upon grounds which are not apparent on the face of the record, the objection can not be taken advantage of by a motion to quash the indictment, but only by a plea in abatement.

PRACTICE.—*New Trial.—Evidence.—Supreme Court.*—Where the only question presented by the alleged error of the circuit court, in overruling the motion for a new trial, is the sufficiency of the evidence to sustain the finding of guilty, and the evidence is conflicting, the finding will not be disturbed, or the judgment reversed, by the Supreme Court.

From the Warren Circuit Court.

W. P. Rhodes, for appellant.

F. T. Hord, Attorney General, *H. H. Conley*, Prosecuting Attorney, and *J. G. Pearson*, for the State.

HOWK, C. J.—In this case, the appellant, Mathis, was indicted, tried and convicted for an unlawful sale of intoxicating liquor to a person under the age of twenty-one years; and from the judgment of conviction he has appealed to this court.

The appellant has here assigned, as errors, the decisions of the circuit court, (1) in overruling his motion to quash the indictment, and (2) in overruling his motion for a new trial.

Of the first of these alleged errors, it is said in argument by appellant's counsel: "That the record discloses the fact, that the array of the grand jury was not legal. The statute requires that the jury shall be resident voters and freeholders of the county. Sec. 1393, R. S. 1881. The statement in the record is, that the grand jury panel was filled from the by-standers, and then it says, 'All of said jurors being good and lawful men, residents of Warren county and legal voters therein.' I submit, that the motion to quash should have been sustained."

This is the entire argument of the appellant's counsel on the first error complained of, and we are not convinced thereby that the court erred in refusing to quash the indictment. Counsel is mistaken in asserting, as he does, that "the record discloses the fact," that the grand jurors, or any of them, were not "freeholders of the county." The most that can be correctly said is, that the record does not disclose in direct terms, whether the grand jurors were, or were not, "freeholders of the county." In such case, if the fact existed that the grand jurors, or any of them, were not freeholders of the county, the defect in the indictment could not be reached, or taken advantage of, by a motion to quash such indictment, but only by a plea in abatement. *Wills* v. *State*, 69 Ind. 286. In this case, the indictment commenced as follows: "The grand jurors of Warren county, in the State of Indiana, good and lawful men, duly and legaily empanelled, sworn and charged, in the Warren Circuit Court of said State, at the March term for the year 1883, to inquire," etc. After quot-

ing a similar recital from the indictment, in *Powers* v. *State*, 87 Ind. 144, this court said: "With the presumptions that are indulged in favor of the regularity of legal proceedings, the foregoing sufficiently shows that the indictment was found and returned by a legal and duly qualified grand jury." *Bailey* v. *State*, 39 Ind. 438; *Bell* v. *State*, 42 Ind. 335; *Holloway* v. *State*, 53 Ind. 554.

The motion to quash the indictment, in the case at bar, was correctly overruled.

Of the second error assigned, the appellant's counsel says; "The reasons for a new trial are three, and all raise the same question, namely: Was the evidence sufficient upon which to base a finding of guilty?"

Frank Ray, to whom the unlawful sale was charged to have been made, testified on the trial, as follows: "I bought intoxicating liquor at defendant's saloon, March 31st, 1883. Do not know whether I got it of defendant, or of his bartender. They were both there at one time, when I was drinking. Called it lager beer; I bought one glass and paid five cents for it. Was going on nineteen years old, was under twenty-one—between eighteen and nineteen years old. In Mathis's saloon, in Williamsport, Warren county, Indiana. Was at the saloon in the evening, after supper. Bud Moore was with me. It might have been that Bud Moore bought it, at the time defendant was in. It was between six o'clock and ten o'clock. Jerry Prater, the bartender, was behind the bar; do not remember which I bought of. Did not see Eli (defendant) but once. I drank when he was in; did not buy it at that time."

This witness was corroborated to some extent, by the testimony of one David Moffit, and was contradicted generally by the testimony of the defendant. The trial court had opportunities and facilities, which we can not have, for determining the credibility of these witnesses, and the proper weight to be given to their respective evidence. We can not say, that the court was not authorized by the evidence in the

record to find the appellant guilty, as charged in the indictment; and, therefore, we can not reverse the judgment upon the evidenee.

We find no error, in the record of this cause, which authorizes or requires the reversal of the judgment.

The judgment is affirmed with costs.

Filed April 17, 1884.

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No. 11,141.

MORRIS v. THE STATE, EX REL. CRAWFORD.

MANDAMUS.—*Amendment of Complaint and Writ.—Abatement.*—In a proceeding for a mandate, where an amended complaint is filed in the name of the State, it is proper to amend the writ accordingly, and no error was committed in refusing to quash the writ or in sustaining a demurrer to a plea of abatement to such writ because of such amendment.

JUSTICE OF THE PEACE.—*Office and Officer.—Election and Appointment.*—Where three persons were elected to the offices of justice of the peace, in a certain township, at the April election, 1882, one of whom qualified to succeed himself, on the 15th day of April, 1882, another failed to qualify, and the incumbent of the third resigned and was appointed to fill the vacancy occasioned by the failure of the second to qualify, and took possession of the books and papers pertaining to the former officer. *Held*, that when the remaining justice qualified he became entitled to the office books and papers pertaining thereto, formerly held by such appointee.

PRACTICE.—*Verdict.—Instructions.—Harmless Error.*—Where, upon the material and undisputed facts in the case, the verdict could not have been otherwise, the Supreme Court will not inquire whether a challenge to a juror was improperly overruled, nor whether instructions were erroneously given or refused, as such errors would not reverse the judgment.

SAME.—*Discretion as to Admission of Evidence.*—After the parties have rested it is in the discretion of the court to admit other evidence; for this purpose it is unnecessary to set aside the submission, but this is not necessarily erroneous.

From the Harrison Circuit Court.

W. N. Tracewell and *R. J. Tracewell*, for appellant.

W. T. Zenor and *S. J. Wright*, for appellee.

BEST, C.—This proceeding was by mandate to compel the appellant, a justice of the peace, to deliver to the relator, also a justice of the peace, certain books and papers, to the custody of which the latter was entitled, as is alleged, by virtue of his office.

An alternative writ was issued which recited, in substance, that the appellant was a justice of the peace of Harrison township, Harrison county, in this State, and that his term of office expired on the 5th day of November, 1882; that at the preceding April election the relator was elected, commissioned and qualified as the appellant's successor, and on the 6th day of November, 1882, demanded of him the books and papers belonging to said office, but that appellant refused to deliver and still retains the same.

The proceeding was instituted in the name of the relator, and, upon objection made, an amended complaint was filed in the name of the State upon relation, and the writ was amended accordingly and in some other respects. An answer in abatement was filed to the writ as amended, to which a demurrer was sustained.

A return was then made, stating in substance, that three justices were to be elected at the April election in said township, and that the relator, George H. Matthews and Isaac W. Rhodes were each elected at said election as justices of the peace of said township; that said Rhodes failed to qualify, and by reason thereof there was a vacancy in one of said offices in said township; that appellant's office did not expire till the 5th day of November, 1882, and before that time he resided in the town of Corydon, in said township, where he had all the books and papers pertaining to his office; that on the 1st day of November, 1882, he resigned his office, and on the next day the commissioners of said county appointed him a justice of the peace of said township; that he was commissioned and qualified on the 4th day of November, 1882, as such justice, and by virtue of his office and by reason of the fact that he was the nearest jus-

tice to said books and papers he took possession of the same and still retains the same as such justice.

A reply to this return was filed. The first paragraph was a general denial, and the second averred, in substance, that two of the justices of the peace whose successors were to be elected at said election, viz., the appellant and George H. Matthews, resided in Corydon, in said township, and the other, James Cunningham, resided two miles south of said town, in said township; that the term of office held by said Cunningham expired on the 16th day of April, 1882, and that said Rhodes became a candidate and was elected thereto; that George H. Matthews was a candidate for the office held by himself and which expired when his successor was elected thereto; that the appellant and the relator were opposing candidates for the office then held by the appellant, and that the relator was elected thereto and was commissioned and qualified for four years from the 5th day of November, 1882; that said Rhodes, though commissioned, failed to qualify, and by reason thereof such office became vacant; that the appellant was appointed to fill such vacancy, and claims such books and papers by virtue of such appointment, and not otherwise.

A demurrer to the second paragraph of the reply was overruled, the issues were tried by a jury, and a verdict was returned for the appellee. Motions for a *venire de novo* and for a new trial were overruled, and these various rulings are assigned as error.

It is not insisted that the court erred in permitting an amended complaint in the name of the State to be filed. This having been done, it was proper to amend the writ so as to correspond with the amendment made. It was also within the discrétion of the court to permit or direct its amendment in other respects, and its refusal to quash the writ because of such amendments was not error, nor was there any error in sustaining the demurrer to the answer alleging these amendments in abatement of the writ.

No valid objection is made in appellant's brief to the sec-

ond paragraph of the reply. It is suggested that this paragraph is a departure, but it is not stated why, and we are unable to assign any reason for such objection. We think it was sufficient, and that the demurrer was properly overruled.

The motion for a new trial embraces many reasons. Those that have been discussed will alone be considered. The first is that the verdict is contrary to the law and the evidence. The evidence is in the record, and we have examined it carefully. There does not seem to be any dispute about the material facts. The dispute is more a question of law than of fact. The evidence shows that the offices of three of the four justices of the peace of Harrison township, in said county, would expire before the next election after the election of April, 1882; that one of those offices had been held by James Cunningham, who had resigned the same; another was held by George H. Matthews, by appointment, and would expire as soon as his successor should be elected and qualified, and the other was held by the appellant, whose term would expire on the 5th day of November, 1882; that at the election in April, 1882, the relator, George H. Matthews, and Isaac W. Rhodes were elected justices of the peace; that Matthews was commissioned and qualified as such justice to succeed himself on the 15th day of April, 1882; that Rhodes failed to qualify, and by reason thereof there was a vacancy in the office he was elected to fill; that appellant resigned his office on the 1st day of November, 1882, and on the 4th day of said month was appointed a justice of the peace to fill the vacancy created by the failure of Rhodes to qualify; that he was commissioned, qualified, and immediately took possession of the books and papers theretofore used by him as a justice of the peace; that the appellant was commissioned as a justice for four years from the 5th day of November, 1882, qualified, and on the 6th day of said month demanded of the appellant the books and papers of the office theretofore held by him; this demand was refused, and the books and papers re-

tained. These facts are undisputed, and but one conclusion can be drawn from them.

The commission of Matthews as a justice from the 15th day of April, 1882, and the appointment of appellant to fill the vacancy occasioned by the failure of Rhodes to qualify, left no office for the relator other than the one the appellant had formerly held and to which the books and papers in dispute belong. Under these circumstances the appellant can not consistently dispute the fact that the relator was elected to succeed him, and we will not inquire whether some evidence offered in support of this fact was or was not properly admitted. The relator was commissioned as a justice for a term of four years from the 5th day of November, 1882, and as Matthews and the appellant had been commissioned and qualified as justices of the other offices, it follows that the appellant was entitled to this one and to the books and papers pertaining thereto. The fact that appellant, as the nearest justice, took possession of them did not entitle him to hold them after the relator qualified. Section 1428, R. S. 1881.

The resignation of the appellant created a vacancy, and if after his appointment he was entitled to take possession of the books and papers, he was not entitled to retain them after the relator qualified, and, therefore, the verdict of the jury was clearly right upon the undisputed facts in the case.

The appellant also insists that the court erred in not sustaining a challenge, for cause, to one of the jurors. Without holding that such ruling was or was not erroneous, we will merely say that the appellant suffered no injury by such ruling, as upon the material and undisputed facts no other verdict could have been properly returned.

This being the condition of the record the court will not examine the instructions given or refused, as an error in this respect will not warrant a reversal of the judgment.

After the appellee rested, the appellant moved to strike from the relator's certificate of election that portion which purported to show whom he was elected to succeed, on the

ground, among others, that the poll books had not been read in evidence, and to avoid this objection the court, at the appellee's instance, set aside the submission, again submitted the cause to the jury and permitted the poll books to be read without re-swearing the jury. This was unnecessary but not erroneous. The admission of this evidence was in the discretion of the court, and this was all that was done, though done in an unusual and an indirect way. The appellant, however, suffered no injury, so far as we can see, and there is, therefore, no available error in this ruling.

Our attention is also called to the motion for a *venire de novo*, but no reason is assigned why this motion should have been sustained, and we therefore conclude that it was properly overruled.

The conclusion reached renders it unnecessary to consider the cross errors assigned. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, that the judgment be and it is hereby affirmed, at the appellant's costs.

Filed April 17, 1884.

No. 10,677.

HESHION ET AL. *v.* SCOTT, ADMINISTRATOR.

ASSIGNMENT OF ERRORS ON APPEAL FROM MARION SUPERIOR COURT.—On appeal from the Marion Superior Court, error can not be well assigned upon the rulings at special term.

PLEADING.—*Complaint on Appeal Bond.*—A complaint on a bond in the usual form, given on appeal to the Supreme Court, which properly alleges the judgment, the appeal from it, the execution of the bond, making it an exhibit, and alleges that the judgment was affirmed and remains unpaid, is good.

From the Superior Court of Marion County.

B. F. Davis, for appellants.

F. Alford, for appellee.

BICKNELL, C. C.—The appellee, as administrator *de bonis*

non of the estate of Valentine Meier, deceased, brought this suit against the appellants on an appeal bond.

The complaint averred that said Valentine Meier, now deceased, on the 29th of June, 1880, recovered a judgment against Patrick C. Leary in the Hancock Circuit Court for the possession of real estate and $325 as damages for its detention, from which judgment said Leary appealed to the Supreme Court, and executed his appeal bond, in the penalty of $1,500, with the defendant Charles Heshion as his surety, conditioned that said Patrick C. Leary would duly prosecute said appeal and pay the judgment and costs which might be rendered against him.

A copy of the bond, which is in the common form, was made a part of the complaint, showing that the defendants were held and firmly bound unto the said Valentine Meier, as stated in the complaint. The bond is dated June 30th, 1880. The complaint further averred that said judgment of the Hancock Circuit Court was affirmed by the Supreme Court, and remains wholly unpaid; that Valentine Meier died testate on the 16th day of January, 1881, and that on the 30th day of April, 1881, the said plaintiff was appointed administrator *de bonis non* of said Meier's estate, with the will annexed. Wherefore, etc.

The defendants jointly demurred to the complaint, for want of facts sufficient. This demurrer was overruled, but no exception was taken. The defendants each filed a general denial of the complaint.

Upon a trial by the court, in special term, without a jury, there was a finding for the plaintiff for $397, upon which a judgment was rendered collectible without relief from valuation or appraisement laws, with an order that the property of the defendant Leary be first exhausted before resort had to the property of the defendant Heshion. There was no objection made to this judgment, and no motion was made to modify it.

The defendants moved for a new trial, but the motion is

not in the record, being omitted "by direction of the appellants." The motion was overruled, and the defendants excepted, but there is no bill of exceptions, the same "being omitted by direction of the appellants."

The defendants appealed to the superior court in general term, and there they assigned the following errors.

1. The court in special term erred in overruling the defendants' demurrer to the complaint herein.

2 and 3. The court in special term erred in overruling the motion for a new trial.

The court in general term affirmed the judgment of the court in special term.

The defendants then appealed to this court, and here they assign errors as follows:

1. The court below at special term erred in overruling the separate demurrers of appellants to the complaint.

2. The court in special term erred in rendering a judgment collectible without relief from valuation or appraisement laws.

3. The court at general term erred in affirming the judgment at special term.

4. The complaint does not state facts sufficient to constitute a good cause of action.

The first two of these assignments of error are not valid assignments. Buskirk Prac. 127. As to the two remaining assignments, the record shows clearly that the court in general term did not err in affirming the judgment of the court in special term, and the complaint was clearly sufficient. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the superior court in general term be and the same is hereby in all things affirmed at the costs of the appellant, with ten per cent. damages.

Filed Dec. 19, 1883. Petition for a rehearing overruled April 17, 1884.

No. 9640.

EARLE v. SIMONS.

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134 525
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161 389

TAXES.—*Tax Title.—Personal Property.—Burden of Proof.—Statute Construed.*—One who asserts title by virtue of a sale of lands for taxes is required, under the revenue act of 1872, to prove that the owner of the land had no personal property out of which the taxes might have been made. Sections 222, 224, 254 and 255 do not relieve him of this burden.

SAME.—*Statute of Limitations.*—The limitation of five years, fixed by section 250, applies only to suits to recover possession, and not to those to quiet title.

PRACTICE.—*Supreme Court.*—Where the judgment gives proper relief, and in addition thereto other relief not proper, but no objection has been made to the judgment and no motion to modify it, the Supreme Court will not reverse.

From the Porter Circuit Court.

J. Bradley and *J. H. Bradley*, for appellant.

H. A. Gillett, for appellee.

ZOLLARS, J.—This action was commenced in the Lake Circuit Court on the 9th day of May, 1878. The venue was afterwards changed to the Porter Circuit Court. The complaint by appellee, upon which the case was tried, consists of two paragraphs. The first is in the ordinary form in actions of ejectment. In it appellee asks a judgment for the recovery of the possession of the undivided one-half of a section of land in Lake county.

In the second appellee's title is set up in detail, and it is averred that appellant had entered upon the land, and claimed to hold and own the same by a title paramount to that of appellee. The prayer is that the title to the land be quieted in appellee, and that he have judgment for the possession and damages for the unlawful detention. The answer upon which issue was joined consists of three paragraphs, each being to the whole complaint. The first is a general denial. The second sets up that appellant claims the said land under and by virtue of a sale for delinquent taxes made by the treasurer of Lake county, on the 10th day of February, 1873, and a

deed made thereunder by the auditor of the county on the 5th day of May, 1875, and that this action was not commenced within five years after the date of the sale. A copy of the tax deed is filed with this paragraph.

The third, which is somewhat in the form of a cross complaint, sets up the payment of a certain amount on the sale of the land for taxes in 1873, and the payment of subsequent taxes, and asks that the whole be declared a lien upon the land. The case was tried in June, 1881, and a judgment rendered quieting the title in appellee, that he have possession, and giving appellant a judgment for $194.81 for taxes by him paid. A motion for a new trial by appellant was overruled. He excepted, and prosecutes this appeal. The only question discussed by his counsel is the alleged error in overruling the motion for a new trial. There is no dispute about appellee's title and his right to recover, unless it has been extinguished by the sale of the land for taxes.

It appears from the evidence that the portion of the land in dispute has been owned in fee simple, as follows: From December, 1867, to April 8th, 1871, by Thomas Ewing: from April 8th, 1871, to the 13th day of February, 1872, by Andrew Peterson and Inguel Radstrom; from the 13th day of February, 1872, to the 2d day of May, 1874, by John H. Bonnell; from the 2d day of May, 1874, to the present time, by appellee.

On the 15th day of February, 1870, appellant received a deed from one A. T. Coquillard, for the other undivided one-half of the section, and upon that deed claimed to own the interest therein described. On the 25th day of November, 1871, he commenced an action in partition, against said Peterson and Radstrom, as the owners of the undivided one-half of the section of land now in dispute, claiming to own the other undivided one-half, and procured a temporary injunction against said Peterson and Radstrom, enjoining them from cutting and removing timber from the land. This injunction remained in force until the March term, 1872, of

the Lake Circuit Court. During the pendency of this action, one Morrison was made a party, and disputed with the appellant the ownership of the undivided one-half claimed by him. This litigation terminated in a decision by this court, in 1879, that Morrison was the owner of the one-half claimed by appellant.

Appellant claimed the interest in dispute between him and Morrison from 1870 until the decision of this court in 1879. In the fall of 1871, he built a shanty upon the land, and occupied it by tenants up to the time of the trial of this action, together with two or three acres around it, which have been enclosed by a fence.

Appellant never claimed any title to the undivided one-half covered by the tax deed, being that portion in dispute in this action, until after the tax deed was delivered to him in May, 1875. Before the temporary injunction was ordered, Peterson and Radstrom cut some wood on the land. Bonnell and Morrison also cut wood on the land.

In 1877, appellee and said Morrison commenced cutting timber on the whole section, except a small portion, made improvements, built fences, and cleared about three hundred acres. There is evidence on the part of appellee, that Peterson owned personal property in 1871 and 1872, situate in the county, to the amount of $500. Radstrom and Bonnell, also, had personal property exceeding in value the amount of taxes. There is no evidence as to whether or not Ewing lived, or had personal property, in the county.

In 1877, Morrison tendered appellant $125 for taxes paid, but did not inform him that it was tendered in behalf of appellee. At that time, also, a notice was served upon appellant by Morrison, not to make any improvements upon the land. There is nothing to show whether or not this notice was from appellee or Morrison. The only evidence in support of the tax title is the certificate and deed by the county treasurer and auditor, which certificate was introduced in evidence over the objection of appellee. The certificate re-

cites, that legal notice having been given for four successive weeks, the treasurer of the county, on the 10th day of February, 1873, sold to appellant, for the sum of $70.58, the land in controversy, said sum being the amount of taxes, penalty, interest, and costs, due on the land for the years 1871 and 1872, being assessed and duly entered for taxation, in the name of John H. Bonnell, and that at the end of two years appellant would be entitled to a deed for the interest in said land so sold.

The deed recites that on the 5th day of May, 1875, appellant presented to the auditor said certificate, from which it appears that appellant purchased the land and other tracts at a tax sale on the 10th day of February, 1873, returned delinquent in the name of John H. Bonnell, John G. Earle, Anton Hoffman and one Reed, for the non-payment of taxes, etc., for the years 1871 and 1872, and paid therefor $113.20, which said lands had been recorded in the auditor's office as delinquent for the non-payment of taxes, etc.; and that legal publication was made of the sale of said lands on the 10th day of February, 1873. There is this further statement: "And it appearing from the records of said county auditor's office that the aforesaid lands were legally liable for taxation, and had been duly assessed and properly charged on the duplicate with the taxes for the years 1871 and 1872," etc.

Appellant asks a reversal of the judgment upon two grounds, and the argument of his counsel is confined to these.

It is claimed first, that appellant is the owner of the land by virtue of a sale and purchase for delinquent taxes, and that the certificate and deed are sufficient evidence of the sale, and the regularity and validity of the proceedings leading thereto. This claim is based upon sections 222, 224, 254 and 255 of the revenue act of December, 1872, 1 R. S. 1876, p. 122, *et seq.*, and it is maintained that the burden is upon appellee to show that the law was not in all things complied with.

Appellee claims that the evidence of the sale and prior

proceedings is not sufficient to establish a title in appellant, for the reasons, among others, that there is no legal evidence that the land was ever assessed or sold for taxes; that there is no evidence to show that the owner of the land in 1871 and 1872 had not personal property in the county at the time of the sale, out of which the taxes might have been made; that on the contrary, it is shown that the parties to whom the land was assessed had such personal property, and that appellant, claiming to own the undivided one-half of the land under the deed to him from Coquillard, was a tenant in common with the owner of the undivided one-half now in litigation, and as such tenant in common could not acquire title to that interest by purchase at tax sale. Section 222 provides that upon the production of the certificate, the auditor shall execute to the owner of it a deed, which shall vest in the grantee an absolute estate in fee simple, etc. This section means nothing more than that such a title shall vest by such deed, provided all of the requirements of the law have been complied with by the officers charged with the duty of assessing and collecting taxes. *Steeple* v. *Downing*, 60 Ind. 478.

Sections 254 and 255 are as follows:

"Sec. 254. No general or special tax authorized by the laws of this State, and which shall be assessed upon any property in any county, township, city or town within this State, shall be held to be illegal or invalid for want of any matter of form in any proceeding not affecting the merits of the case, and which shall not prejudice the rights of the party assessed; nor shall any sale of property for the non-payment of taxes thereon be invalid, unless it shall be made to appear that the legal taxes, costs and charges were tendered to the proper officers within the time limited by law for the payment of such taxes; or, in case of the sale of real estate, unless it shall be made to appear that all legal taxes assessed upon such real estate, together with all legal costs and charges thereon, were tendered to the officer authorized to receive such

redemption money, within the time limited by law for the redemption thereof, and all taxes assessed upon any property in this State shall be presumed to be legally assessed until the contrary is affirmatively shown; and no sale of real estate for the non-payment of the taxes thereon shall be rendered invalid by showing that any certificate, return, affidavit or other paper required to be made and filed in any office, is not found in any office where the same ought to be filed or found; but, until the contrary is proven, the presumption shall be, in all cases, that such certificate, return, affidavit or other paper, was made and filed in the proper office.

"Sec. 255. In all suits and controversies involving the title to land claimed and held by virtue of a deed executed by the county auditor, for non-payment of the taxes thereon, the person claiming adverse title to such deed shall be required to prove, in order to defeat the title conveyed by such deed, either that the land described therein was not subject to taxation at the date of the assessment of the tax for which it was sold; or that the taxes, for the non-payment of which such land was sold, were paid to the proper officer within the time limited by law therefor; or that the same has not been assessed for the taxes for the non-payment of which it was sold; or that the same has been redeemed pursuant to law; or that a certificate, in proper form, had been given by the proper officer, within the time limited by law for paying taxes, or redeeming from sales made for the non-payment thereof, stating that no taxes were due, or that the lands were not subject to redemption."

Under former tax laws it was held that a party claiming under a tax title should show a substantial compliance with every provision of the law by which the sale was brought about; that every step, from the listing of the land for taxation to the consummation of the title by a deed to the purchaser, was a separate and independent fact, the existence of which was necessary to support the title, and that the burden of establishing these facts was upon the party claiming title

under a tax sale. *Gavin* v. *Shuman*, 23 Ind. 32. The provision of the present law, above set out, doubtless limits the proof to be adduced by the holder of the tax deed, but does not, we think, relieve him entirely of the burden of proving portions of the proceedings leading to the sale and deed.

These sections, taken together, seem to relieve the holder of the tax deed of the necessity of proving that the proceedings leading to the sale are regular in unsubstantial matters of form; that the land was subject to taxation at the date of the assessment; that the tax was not paid before the sale, or during the time allowed for redemption; that the land was legally assessed for the taxes for the non-payment of which it was sold; and in case any certificate, return, affidavit, or other paper required to be made and filed in any office, *is not found* in such office where the same ought to be found, the presumption is that they were so made and filed, and the holder of the tax deed is not required to make proof that they were so made and filed. In all of these particulars except the payment of taxes, the burden seems to be upon the party claiming adversely to the tax title, to establish the negative, and to prove affirmatively, that the taxes were paid before sale, or during the time allowed for redemption. Section 254 further provides that no sale of real estate shall be invalid, unless it shall be made to appear that all legal taxes, etc., assessed upon such real estate, were tendered to the officer authorized to receive such redemption money, within the time allowed by law for the redemption thereof. This can not mean that such tender must be made to invalidate a sale of real estate, although the owner may have had personal property in the county at the time of the sale, out of which the tax might have been made. The whole act must be construed together. Other sections imperatively require that the personal property of the owner shall be exhausted before the real estate shall be sold, and the uniform holding of this court has been, as well as that of the courts of other States having similar statutes, that a sale of the realty without ex-

hausting the personal property is void. And in all cases, in the absence of statutes to the contrary, the burden is upon him claiming title under a tax deed, to prove that the law has been complied with in thus first exhausting personal property, or that the owner of the realty had no personal property out of which the tax might have been made. The portion of section 254, therefore, which relates to the tender of the taxes, must be held to apply to cases where the owner had no personal property out of which the tax might have been made. It is contended that unless the party resisting the claim under the tax deed proves some one of the facts mentioned in section 255, the sale will be valid, although the holder of the tax title may have proven nothing in relation to personal property. This, we think, is not a proper construction of the section. The proof of any one of the facts therein mentioned would defeat the title under the tax deed, but it does not follow that, in the absence of such proof, the title is good without something more than the deed to support it. This is apparent from section 256, immediately following, which provides a remedy for the holder of the tax deed, in case the sale shall prove to be invalid and ineffectual to convey title, *for any other cause than such as are enumerated in the preceding section* (255). It will be observed that proof of a want of personal property is not dispensed with by any of the sections above referred to. Section 224 prescribes a form of deed, and provides that it shall be conclusive evidence of the truth of all facts therein recited, except that the taxes had been paid in the proper time, of which fact the deed is *prima facie* evidence.

The form contains no statement in relation to the ownership of personal property by the owner of the land; neither does the deed in the case in hearing. Section 224, and the form of deed prescribed therein, are almost, if not exactly, identical with section 168, and the form prescribed by it, under which the case of *Gavin* v. *Shuman*, 23 Ind. 32, was

decided. Neither the recitals in the deed in the case at bar, nor any of the sections of the act of 1872, dispense with proof, on the part of the holder of the tax deed, in relation to personal property, or impose upon the owner of the land the burden of proving his ownership of such personal property at the time of the sale. It follows, therefore, that the burden is upon the holder of the tax deed, in order to support his title under it, to prove that at the time of the sale the owner of the land had no personal property out of which the taxes might have been made; and so this court has uniformly held under the tax law of 1872, and previous acts upon the subject. *Schrodt* v. *Deputy*, 88 Ind. 90; *Morrison* v. *Bank of Commerce*, 81 Ind. 335; *Langohr* v. *Smith*, 81 Ind. 495; *Sharpe* v. *Dillman*, 77 Ind. 280; *Smith* v. *Kyler*, 74 Ind. 575; *Ward* v. *Montgomery*, 57 Ind. 276; *Abbott* v. *Edgerton*, 53 Ind. 196; *Ellis* v. *Kenyon*, 25 Ind. 134.

In the case in hearing, there was no evidence showing, or tending to show, that at the time the land was sold the owner had no personal property out of which the tax might have been made, and hence the sale was void. As we have reached the conclusion that the sale was void for the reasons stated, it will not be necessary for us to notice the lack of evidence in other particulars.

Appellant asks that the judgment shall be reversed upon the further ground that this action was not commenced by appellee within five years after February 10th, 1873, when it is alleged the land was sold by the treasurer. It will be observed that the complaint asks for the possession of the land, and the quieting of the title thereto in appellee. This double relief was granted by the court below, and judgment rendered accordingly. No objection or exception was interposed to the form of the judgment below, nor was there any motion to modify it. The statute of limitation under section 250 was pleaded to the whole complaint, and counsel for appellant, in the court below, and in this court, seek to protect his

title under it against the whole case as made by appellee. If the action on the part of appellee and the judgment rendered were a case simply for the recovery of possession of the land, it would become necessary for us to examine in detail the questions discussed by counsel in connection with this branch of the case. Since this appeal has been pending, section 250 of the act of 1872, relied upon, has undergone an examination, and it has been held that it applies only to actions brought to recover the possession of land sold for taxes, and not to actions to quiet the title to lands so sold.

It will be sufficient, in the cause in hearing, to cite that case, without restating the grounds upon which the decision was based. *Farrar* v. *Clark*, 85 Ind. 449.

We do not decide that appellee was not entitled to all the relief given him by the judgment; nor as to whether or not, if the case had been one simply for the recovery of the possession of the land, he would have been barred by the limitation prescribed in section 250, *supra*. Under the decision last above cited, he was clearly entitled to have the title to the land quieted in him.

The well established rule is that if any part of the judgment is valid under the issues, the judgment will not be reversed in this court, although relief is given that would have been erroneous if the proper exception had been taken, or motion to modify had been made in the court below. *Rardin* v. *Walpole*, 38 Ind. 146; *Smith* v. *Dodds*, 35 Ind. 452; *Gavin* v. *Shuman*, *supra*; *Smith* v. *Kyler*, *supra*; *Floore* v. *Steigelmayer*, 76 Ind. 479.

As we find no available error in the record, the judgment is affirmed, at the costs of appellant.

Filed July 17, 1883. Petition for a rehearing overruled April 18, 1884.

No. 11,220.

IRVIN ET AL. *v.* RATLIFF ET AL.

PARTIES.—*Determination of Conflicting Claims.—Depositary.—Counter-Claim.—Practice.—Contract.—Exhibit.*—The plaintiffs sued R. and B., averring that there was a sum of money in R.'s hands which he refused to pay, and in which B. claimed an interest. R. answered that the money was in his hands, as the plaintiffs had averred, but under a written contract with the plaintiffs, exhibited, that he should pay B. out of it any sum due B. from the plaintiffs upon a certain contract between B. and the plaintiffs, and that B. claimed the whole, and he offered to pay as the court should direct, and prayed that the controversy between the plaintiffs and B. be determined. B. filed a pleading in which he set up his contract with the plaintiffs and breaches thereof, the receipt of the money by R. as averred in R.'s answer, and prayed judgment for his damages against the plaintiffs, and that R. pay the money in his hands to B. The plaintiffs answered this pleading and B. replied.

Held, that B. might recover judgment against the plaintiffs in that action for a greater sum than was in R.'s hands, and that R. pay the latter upon it.

Held, also, that B.'s claim against the plaintiffs was not founded on the written contract between the plaintiffs and B. and, therefore, need not be made a part of his pleading.

TRIAL.—*Postponement.*—An affidavit in support of a motion to postpone a trial for one day, because of the absence of a party whose presence is necessary, which shows no excuse for such absence, is not sufficient.

From the Grant Circuit Court.

G. W. Harvey, P. S. Kennedy, S. C. Kennedy and *E. C. Snyder*, for appellants.

H. Brownlee, for appellees.

BLACK, C.—The appellants, Volney Q. Irvin and Frederick D. Hustis, brought suit against the appellees, John Ratliff and John Bundy, alleging in the complaint that the sum of $1,173.24, which was due to the plaintiffs from Grant county, as a balance for constructing a free gravel road, was, by the authority of the plaintiffs, received for them by the defendant Ratliff, who refused to pay said sum or any part of it to the plaintiffs; that the defendant Bundy claimed an interest in said money; and that he was made a party in order that he might set up his interest.

Ratliff answered, in effect, that the board of commissioners of said county, in 1880, ordered the construction of said road, and appointed him as the engineer thereof; that the contract for its construction, on or before December 1st, 1880, was let to the plaintiffs, who sublet the work to said Bundy; that he did not complete the road at the time so specified; that in January, 1882, the plaintiffs made a written agreement, set out, by which they turned over their said contract to said Ratliff, the engineer, who was to cause the road to be finished, draw estimates, and, after paying for the completion of the road, to pay said Bundy whatever amount was due him under his contract; that said Ratliff caused the road to be finished, and paid therefor; that there was in his hands, in excess of what was required to finish the road, a balance of $832.71, which was paid by the plaintiffs, and by said Bundy; and that said Ratliff was ready and willing to pay said sum as the court might order; and he asked the court to determine between the plaintiffs and said Bundy as to their rights in the premises.

The defendant Bundy filed a pleading, in which he set up his contracts with the plaintiffs for the construction in part of a portion of said road, and alleged breaches thereof on the part of the plaintiffs and the receipt of money by said Ratliff, by the authority of the plaintiffs, to be paid by him to said Bundy, who demanded judgment against the plaintiffs in a certain amount, and that said Ratliff be required to pay the money in his hands to said Bundy.

The plaintiffs answered this pleading. Bundy replied, and there was a trial by jury, which resulted in a verdict in favor of said Bundy, damages being assessed in his favor against the plaintiffs in the sum of $1,350, the jury also finding that Ratliff had in his hands $832.71, which belonged to Bundy, and that Ratliff be required to pay that sum to Bundy.

The plaintiff made a motion for a new trial, which was overruled, and judgment was rendered on the verdict. The chief question in dispute between counsel relates to the ex-

cess of the amount of the verdict against the appellants over the amount found to be in the hands of Ratliff, to which Bundy was found to be entitled, it being contended on behalf of the appellants, that, the action having been instituted by them to settle the right to the money in the hands of Ratliff, it was proper for the jury to find the amount in Ratliff's hands and award it to Bundy if they found him entitled to it, but that it was inadmissible to find against the appellants for a larger amount. It is said by counsel: "Each paragraph of the cross complaint, it is true, set up matters which constituted a cause of action against the appellant, and upon which a recovery might be had in another suit; but matters therein alleged could only be shown in the present suit for the purpose of ascertaining to whom the money in Ratliff's hands belonged."

To establish his right to the money held by Ratliff, it was necessary for Bundy to show a cause of action against the appellants under his contracts with them in relation to the construction of the road. If, in establishing his right to the money, he necessarily showed a single cause of action in his favor against the appellants for a larger amount than that held by Ratliff, we think it was not necessary or proper that such cause of action should be split up. The law does not favor a multiplicity of actions. The court had all the parties before it, and was capable in that action of doing complete justice to all the parties. It could at once settle the whole dispute which had been litigated in the action, by rendering judgment for Bundy against the appellants and ordering the application thereon of the money which Ratliff held for such a purpose.

It is objected that, while the evidence showed a written instrument executed by the appellants by which they turned over the completion of the road to said engineer and authorized him to pay Bundy, as above stated, Bundy's pleading did not allege that said engineer was so authorized in writing.

Ratliff, as we have seen by his answer, alleged the execu-

tion of his instrument by the appellants and set it out, and admitted that he held a certain sum of money drawn by him pursuant thereto; and Bundy showed by his pleading that something was due to him from the appellants under his contracts referred to in the instrument so set forth by Ratliff. Bundy's cause of action against the appellants for the recovery of damages was based upon his contracts with them. It was not necessary for Bundy to set up the written instrument in question as against Ratliff, who himself pleaded it. It was properly in evidence, and Bundy's cause of action as against the appellants was not founded upon it.

The bill of exceptions shows that at a date some days after the return of the verdict, one of the attorneys for the appellants moved to continue the cause until the afternoon of that day, or until the next morning, and filed his affidavit alleging the absence of the appellants, that one of them named was a material witness, and that his presence was necessary to direct the trial. This affidavit was perhaps filed on the first day of the trial, though the bill states that it was filed on a day which was after the trial. But if it were shown to have been filed on the first day of the trial, it does not indicate any definite or sufficient reason why the party named was not present to look after his interests; and, moreover, the record shows that he testified as a witness on the trial.

An affidavit of this party is set out in the bill of exceptions in connection with a statement that it was read in support of the motion for a new trial. But the affidavit is not referred to in said motion, and the motion does not state any cause for a new trial to which the affidavit can properly be said to apply.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed April 19, 1884.

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No. 10,553.

THE STATE, EX REL. SPARROW, *v.* KELSO ET AL..

DECEDENTS' ESTATES.—*Sale of Land to Pay Debts.—Liens Assumed by Purchaser.—Failure to Pay.—Right of Widow on Foreclosure Against Her.*—Where an administrator, to pay his decedent's debts, sells two-thirds of a tract of land encumbered by a mortgage executed by the decedent and his wife, and the purchaser, as part of the purchase price, assumes the payment of such mortgage, the widow may maintain an action against such purchaser upon the sale of her third under a foreclosure of said mortgage, whether his promise was verbal or in writing, and whether he had executed to the administrator a bond to pay such mortgage or not.

SAME.—*Widow's Action Against Administrator.—Complaint.—Insolvency of Purchaser.*—The widow may likewise, even after final settlement of the estate, maintain an action in such case, against the administrator, on his bond, but, unless her complaint allege the insolvency of such purchaser, it is insufficient.

SAME.—*Widow's Right, Where Administrator Misapplies Funds.*—She can not, however, while such final settlement stands unrevoked, maintain such action against the administrator for his wrongful act in applying the proceeds of such two-thirds to the payment of other debts and allowing such mortgage to continue a lien upon her third.

From the Knox Circuit Court.

C. M. Wetzel, H. S. Cauthorn and *J. M. Boyle,* for appellant.

G. G. Reily, W. H. De Wolf and *S. N. Chambers,* for appellees.

HAMMOND, J.—Action upon a bond executed by an administrator and his sureties for the purpose of selling real estate to pay the decedent's debts.

The case made by the complaint is this: The relatrix is the widow of Nelson Sparrow, who died, testate, in 1877. She elected to take under the law. The decedent's real estate at the time of his death was encumbered by taxes and by a mortgage executed by him and his wife, the relatrix. The appellee Jerome T. Kelso was appointed and qualified as administrator with the will annexed. No personal property came to his hands except what was taken by

the widow. He obtained partition of the real estate with the view of selling to make assets to pay debts. The relatrix's portion of the real estate, as widow, was set off to her in severalty. The residue of the land was appraised and sold by the administrator, under an order of court, subject to the liens. The bond in suit was executed in the proceedings to sell. The estate was afterward settled as insolvent. The administrator's final report was presented to, and approved by, the court, and he was discharged from further responsibility. Breaches of the conditions of the bond are assigned:

1. That the administrator failed to take from the purchaser of the real estate a bond to secure the payment of the liens; that the purchaser refuses to pay such liens; that the mortgage has been foreclosed, and the land sold under the foreclosure at sheriff's sale.

2. That the administrator, instead of using the money received from the sale of the land to discharge the liens upon the real estate assigned to the widow, applied the same to the payment of general debts of the estate.

To each of these breaches of the bond so assigned, the appellees demurred for the want of facts. The demurrer was sustained. The appellant excepted, and, not amending, judgment was rendered in favor of the appellees for costs. The ruling on the demurrer is assigned for error.

The assumption of payment of liens, as part of the purchase-money, by a grantee, need not be in writing. Where a conveyance is made subject to liens, the amount of which is allowed to the purchaser by a deduction from the price of the land, the grantee thereby became bound for the payment of the encumbrances. Suit may be maintained on the contract by the grantor or the lien holders in whose favor the payments were to be made. *McMahan* v. *Stewart*, 23 Ind. 590; *Helms* v. *Kearns*, 40 Ind. 124; *McDill* v. *Gunn*, 43 Ind. 315; *Campbell* v. *Patterson*, 58 Ind. 66; *Carter* v. *Zenblin*, 68 Ind. 486; *Rodenbarger* v. *Bramblett*, 78 Ind. 213.

Section 89 of the decedents' act of 1852, similar to section 2350, R. S. 1881, provided that an executor or administrator, in selling real estate subject to liens, should take a bond from the purchaser to secure their payment. One who purchases real estate at an executor's or administrator's sale, subject to liens, the amount of which is deducted from the purchase price, assumes the payment of such liens whether it is so stated in his deed, or whether a bond is taken from him therefor, or not. His agreement to pay the liens, though not in writing, is enforceable under the authorities above cited. It is the duty of the administrator to pay off encumbrances out of the personalty or by the sale of two-thirds of the land, so as to free the widow's interest from liens created in the lifetime of her husband. *State, ex rel.*, v. *Mason*, 21 Ind. 171; *Perry* v. *Borton*, 25 Ind. 274; *Clarke* v. *Henshaw*, 30 Ind. 144; *Newcomer* v. *Wallace*, 30 Ind. 216; *Hunsucker* v. *Smith*, 49 Ind. 114. No doubt, as appears to have been the case in the present instance, where real estate assigned to the widow is encumbered by a mortgage, also covering land subject to sale by the administrator, such land may be appraised and conveyed subject to the whole amount of the mortgage. In such case the failure of the purchaser to discharge the mortgage gives the widow a right of action against him. His omission to give the administrator a bond to secure the payment of the mortgage would not affect her right of action. The failure of the administrator to take a bond in such case would make him liable for any damage thereby occasioned. But the appellant's complaint fails to show any such damage. The insolvency of the purchaser is not averred, nor any fact alleged from which it may be presumed that the relatrix has not a complete remedy against him. In an action against an administrator for failure to take a bond from one who purchases real estate subject to liens, it must appear that the party complaining has suffered damage by such failure. *Sparrow* v. *Kelso*, 92 Ind. 514.

As to the second alleged breach of the condition of the administrator's bond, we think his final report, until set aside for mistake or fraud, is a complete bar to an action for such breach. *Barnes* v. *Bartlett*, 47 Ind. 98; *Holland* v. *State, ex rel.*, 48 Ind. 391; *Peacocke* v. *Leffler*, 74 Ind. 327. The appellant's cause of action, if the complaint was good in that respect, for the administrator's failure to take a bond from the purchaser of the land to pay liens, would probably not be barred by the final report, as the action in that respect would not involve the correctness of such report. But an action against the administrator on the second ground of complaint, for using money in paying general debts against the estate which should have been applied to discharging liens, does involve the correctness of the final settlement, and can not be maintained until the final settlement of the estate is set aside for fraud or mistake within the time limited by statute.

Our conclusion is that the trial court did not err in sustaining the demurrer to each assignment of the breaches of the conditions of the bond. Affirmed, with costs.

Filed March 28, 1884.

No. 11,015.

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DILL ET AL. *v.* VOSS ET AL.

PARTNERSHIP.—*Lien.—Subrogation.—Parties.—Complaint.*—While W. D. and H. D. were partners in a milling business, G. recovered a judgment against H. D., then insolvent, for an individual debt. The firm at the time was largely involved, and afterwards became insolvent, when H. D. conveyed his interest in the firm property to W. D., subject to the firm debts. G. then obtained a decree against W. D. and H. D. setting aside this conveyance, and subjecting H. D.'s interest in the property to the payment of his judgment. W. D. then paid off some of the partnership debts, and then formed a new firm with two strangers, conveying each an undivided third, the new firm to pay off the debts of the old firm, and make large repairs upon the mill, which they did. In a suit by the members of the new firm to have these payments of the debts of the old firm, and for repairs, declared a lien on the property prior to the

lien of G.'s judgment, these facts were averred in the complaint, and also that G. claimed priority and was threatening to sell on execution.

Held, that the complaint was bad on demurrer.

From the Hamilton Circuit Court.

D. Moss, *R. R. Stephenson* and *C. D. Potter*, for appellants.

T. J. Kane and *T. P. Davis*, for appellees.

BICKNELL, C. C.—A demurrer was sustained to the appellants' complaint, and on this ruling error is assigned. The complaint states that, in January, 1874, the plaintiff William E. Dill and the defendant Henry Dill were partners in a flouring mill, and as such owed Mrs. ——— Dill $500 which they had used in paying for the mill property; that they also owed Alexander Jones $5,500, to secure which the mill property was mortgaged to him on January 11th, 1875; that on April 17th, 1876, said partnership was dissolved, and said Henry Dill conveyed his interest in said property to said William E. Dill, who then became the sole owner of the property, subject to the partnership debts; that on April 25th, 1876, the defendant Gray recovered a judgment against said Henry Dill for individual indebtedness, and also, in a subsequent suit against said William E. and Henry, obtained a decree setting aside said conveyance from Henry Dill to William E. Dill as fraudulent as against Henry Dill's individual creditors, and subjecting the interest of said Henry Dill to the payment of said defendant Gray's judgment.

That afterwards said William E. Dill paid off a part of Jones's mortgage, and then made a partnership with his co-plaintiffs, John H. Dill and Mary E. Dill, and conveyed to them an undivided two-thirds of the property, the agreement being that they should become equal partners with William E., and should assist in paying off the partnership debts and in making necessary repairs of the mill; that afterwards the new firm paid off the remainder of the Jones mortgage, $6.000, and paid Mrs. ——— Dill, her debt aforesaid, amounting to $500, and made repairs of the mill at a

cost of $4,000, and that without these payments the property would have been lost by a foreclosure of the mortgage, and that without these repairs the mill would have become worthless.

That said Henry Dill was insolvent at the date of said Gray's judgment against him, and that said original firm was insolvent at the date of its dissolution, and is still insolvent; that the defendants are claiming that said Gray's judgment has priority over the claims of the plaintiffs on said mill, and are threatening to sell said Henry's interest in the property of the original firm free from the claims of the plaintiffs.

The complaint prays for an accounting between the plaintiffs and the defendants, and that the sum found due the plaintiffs for their said payments and repairs be declared a lien on said property prior to that of said Gray's judgment, and that the plaintiffs may have all proper relief.

It does not appear by the complaint whether or not Mary E. Dill, one of the plaintiffs, and a member of the new firm, is the Mrs. —— Dill, the creditor of the original firm, but the plaintiffs are not entitled to any relief. After the conveyance from Henry Dill to William E. Dill of Henry's interest in the partnership property had been declared void and set aside for fraud, and Henry's interest had been declared subject to Gray's judgment, the property remained *in statu quo*, and William E. Dill had no authority to convey two-thirds of it to his co-plaintiffs, and such conveyance gave the co-plaintiffs no rights as against the lien of Gray's judgment on the interest of Henry in the partnership property.

Gray has a right to sell on execution under his judgment the interest of Henry Dill in the partnership property, and that interest is his share in the surplus remaining after the partnership debts, existing at the time of the dissolution, are paid. *Donellan* v. *Hardy*, 57 Ind. 393; *Burgess* v. *Atkins*, 5 Blackf. 337.

Where a partnership is to be settled upon equitable prin-

ciples, the rule is that the partnership creditors have a priority in the distribution of the partnership assets, and the individual creditors have a priority in the distribution of the individual assets. *Weyer* v. *Thornburgh*, 15 Ind. 124; *Frank* v. *Peters*, 9 Ind. 343; *Conant* v. *Frary*, 49 Ind. 530; *Bond* v. *Nave*, 62 Ind. 505.

In the present case there is no creditor of the original firm intervening; the only indebtedness of the original firm seems to have been the debt to Mrs. —— Dill, and the Jones mortgage; the allegation is that these debts are now paid; that they were paid in part by William E. Dill, who was always bound to pay them, and in part by the new firm, who were bound to pay them under the agreement by which the new firm was created.

The plaintiffs claim that so far as they have paid off any part of the mortgage debt or the debt to Mrs. —— Dill, they are entitled to subrogation. But there is no subrogation where a man pays his own debt. *Lowrey* v. *Byers*, 80 Ind. 443. And no subrogation can deprive the defendant Gray of his right to sell on execution the interest of Henry Dill in the partnership property. Even if William E. Dill, so far as he alone paid any part of the mortgage debt, had been entitled to subrogation, that would be of no advantage to the plaintiffs, because as to such payment there is no joint cause of action in the plaintiffs. Where two or more join as plaintiffs, and the complaint shows a cause of action in one of them only, it is bad upon demurrer for want of facts sufficient. *Berkshire* v. *Shultz*, 25 Ind. 523; *Goodnight* v. *Goar*, 30 Ind. 418; *Maple* v. *Beach*, 43 Ind. 51; *Sim* v. *Hurst*, 44 Ind. 579; *Yater* v. *State, ex rel.*, 58 Ind. 299; *Parker* v. *Small*, 58 Ind. 349; *Hyatt* v. *Cochran*, 85 Ind. 231. As to the repairs made by the new firm, the costs of such repairs can not be added, as against Gray the judgment creditor, to the partnership debts of the old firm. There was no error in sustaining the

demurrer to the complaint. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed April 19, 1884.

No. 11,120.

KARNES v. WINGATE ET AL.

ESTOPPEL IN PAIS.—*Representation or Concealment of Facts.—Knowledge of Facts.—Ignorance of Facts.—Intention to Deceive.—Inducement to Act.*—Where it appeared that R. E. K. had represented to J. W. W., to induce the latter to exchange his stock of goods for certain described real estate in Blackford county, in which D. D. K. had an interest, that D. D. and G. E. K. were the sole owners of such real estate, and had entered into a written obligation for the conveyance thereof within a reasonable time, by a good and sufficient warranty deed, in consideration of the delivery of said stock of goods to D. D. K., the brother of R. E. K., and had put J. W. W. in possession of the real estate; that J. W. W. relied upon the representations of R. E. K., and was induced thereby to act in the premises; and that afterwards R. E. K. had acquired an interest in the real estate, outstanding at the time in the name of his sister, of which he had knowledge and J. W. W. was ignorant.

Held, upon the foregoing facts, that R. E. K. is thereby estopped from asserting, as against J. W. W. and those claiming under him, his after-acquired interest in the real estate in controversy.

From the Blackford Circuit Court.

W. A. Bonham and *J. Noonan*, for appellant.

W. H. Carroll, for appellees.

HOWK, C. J.—The first error complained of by the appellant, the plaintiff below, is the overruling of his demurrer to the appellees' cross complaint.

The appellant sued to obtain the partition of certain real

estate, particularly described, in Blackford county. In their cross complaint, the appellees alleged that, on the — day of September, 1876, they were engaged in the mercantile business and were joint owners of a certain stock of goods, at the town of Dunkirk, in this State; that, at that time, one Daniel D. Karnes, a brother of the appellant, who then had an interest in the north half of the quarter section of land described in appellant's complaint, was desirous of trading the same for said stock of goods, and the appellees made an exchange of said stock of goods, with said Daniel D. Karnes, for said real estate; that the said Daniel D. Karnes not being prepared then and there to perfect a conveyance of such real estate to the appellees, he and the appellant then entered into a written obligation, signed by each of them, in the penalty of $2,000, for the conveyance of such real estate to the appellees, within a reasonable time, by a good and sufficient warranty deed by the then owners of such real estate, in consideration of the delivery of said stock of goods as aforesaid; that the appellant put the appellees in possession of such real estate as the owners thereof; that the appellant and said Daniel D. Karnes, before the execution of said written obligation, represented to the appellee Wingate that said Daniel D. Karnes and one George E. Karnes, were the sole owners of such real estate; that, relying on said representations, the appellees afterwards accepted a conveyance from said Daniel D. and George E. Karnes not knowing of any other claims or encumbrances upon said real estate; that the appellees fully performed all their agreements in and about said exchange of property; that instead of performing his agreement, as in said written obligation specified, the appellant had fraudulently caused a certain interest in such real estate to be conveyed to himself; that, without this real estate, the appellant was wholly insolvent, and said Daniel D. Karnes was insolvent and a non-resident of this State; that unless the appellant was compelled to convey said real estate to the

appellees, or if their title thereto should not be quieted in this action, they were without other remedy and would be irreparably injured; and that the appellees had been in possession of said real estate for more than five years last past, and had made improvements thereon of the value of $1,000, with the full knowledge of the appellant. Wherefore, etc.

In discussing the sufficiency of this cross complaint, the appellant's counsel say: "It will be observed * * * * that appellees relied for their title to that portion of the real estate in controversy, upon an obligation in writing, the precise character of which is not disclosed by the cross complaint, which, they allege, has been lost or destroyed. We may assume, however, for the purpose of this argument, that the instrument was in the nature of a bond for the conveyance of the real estate claimed by the appellees. If a title bond, is it sufficient to give them a title, under the averments in their cross complaint? In answer to this question, it may be suggested that, if there was a bond or contract executed, it was not one in which the appellant covenanted to convey any real estate whatever, but, if such was ever executed, it was simply an obligation in which he sustained the relation merely of surety."

Having thus reached the conclusion that the appellant was "surety only," in the written obligation mentioned in the cross complaint, his counsel then insist with much earnestness and apparent confidence, that "he could be held for damages only, and the appellees could not enforce a specific performance of the contract, only in so far as the principal was concerned."

We are of opinion that appellant's counsel have misapprehended the scope, effect and purpose of the appellees' cross complaint. The appellees do not count upon the written obligation of the appellant and Daniel D. Karnes, mentioned in their cross complaint, and certainly they do not seek to enforce a specific performance of such obligation against the

appellant, in this action. Nor do they claim, that the written obligation or bond is sufficient to give them a title to the real estate in controversy. It does not appear from the averments of the cross complaint, that the appellant executed the written obligation as surety merely for any one; but the allegation is, that he and his brother, Daniel D. Karnes, alike bound themselves for the conveyance of the real estate to the appellees, by a good and sufficient warranty deed, to be executed by the owners thereof, within a reasonable time. If the facts stated in appellees' cross complaint are true, and, as they are well pleaded, the demurrer admits their truth, the appellant is estopped thereby from asserting, as against the appellees and those claiming under them, any interest in the real estate in controversy existing at the time of his contract with the appellees, and subsequently acquired by him. He had represented to the appellees, that Daniel D. and George E. Karnes were the sole owners of the real estate; he had bound himself for the conveyance to them of such real estate, by good and sufficient warranty deed, to be executed by the owners thereof; and, relying upon his representations, they had accepted the conveyance of such real estate by said Daniel D. and George E. Karnes, as such owners thereof. In Bigelow Estoppel, 484, in defining what elements must be present to constitute an estoppel by conduct, the law is thus stated:

"1. There must have been a false representation or a concealment of material facts.

"2. The representation must have been made with knowledge of the facts.

"3. The party to whom it was made must have been ignorant of the truth of the matter.

"4. It must have been made with the intention that the other party should act upon it.

"5. The other party must have been induced to act upon it."

Applying the law as thus stated to the case in hand, we are

of opinion that there is no error in the record of this cause, of which the appellant can complain, or which would authorize the reversal of the judgment. The court did not err in overruling the demurrer to the cross complaint; the evidence fully sustained the special finding of facts; and the court's conclusions of law were authorized by the facts specially found.

The judgment is affirmed with costs.

Filed March 29, 1884.

No. 11,167.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. SHANKS.

NEGLIGENCE.—*Evidence.—Measure of Damages.*—In a suit for an injury as the result of mere negligence, the case can not be made unless it be proven that negligence of the plaintiff did not contribute to the injury, and punitive damages can not be given.

From the Monroe Circuit Court.

G. W. Friedley, for appellant.

M. F. Dunn, G. G. Dunn, J. R. East and *W. H. East*, for appellee.

FRANKLIN, C.—Appellee, by her next friend, sued appellant for injuries received by a truck turning over upon her on the platform at the railroad depot in the city of Mitchell, Indiana.

The suit was commenced in Lawrence county, and the venue was changed to the Monroe Circuit Court, where there was a trial by jury, verdict for plaintiff, and, over a motion for a new trial, judgment was rendered upon the verdict.

The error complained of is in overruling the defendant's motion for a new trial; and the only reasons insisted upon

are, that the verdict is not sustained by sufficient evidence, and error in the instructions to the jury.

The complaint charges that in June, 1881, said defendant, by its agents, carelessly and negligently loaded the truck so top-heavy that when touched, it was liable to turn over, and placed and left said truck, so loaded, upon the depot platform within a public sidewalk; that the plaintiff, while passing on the platform, touched the truck, when it fell over upon her, and inflicted the injuries complained of.

Without deciding upon the sufficiency of the evidence, we proceed to examine the instructions.

It is insisted by appellant that the court erred in its instructions given to the jury, and in refusing to give instructions asked by the defendant.

The first instruction asked by the plaintiff, given by the court, and excepted to by the defendant, is as follows:

"In this class of cases, ordinarily, the plaintiff must be without fault, but this is not always the case; and in this case, if you should find from the evidence that the defendant improperly and negligently loaded said truck, and it was loaded in such a manner as to be dangerous by reason of said loading and in allowing their truck so loaded with boxes, chests and trunks to remain upon a street or sidewalk or platform where the public had a right to travel, were guilty of gross or wilful negligence in so allowing it to remain so loaded; and should you also find in this case, that the plaintiff was guilty of slight negligence only, and you further find that the plaintiff was injured as charged in the complaint, by reason of such gross or wilful negligence on the part of the defendant, such slight negligence on the part of the plaintiff would not defeat this action. And if you find these to be the facts, you should find for the plaintiff."

This instruction is erroneous. There is nothing in the complaint or evidence that justified an instruction upon wilfulness; it was not applicable to the case. Gross negligence

is not classed with wilfulness. In this class of cases there are no degrees in negligence, and gross negligence is no more than mere negligence. And when wilfulness is not charged, the plaintiff, in order to recover, must make out a case of unmixed negligence, and that she was without fault. Contributory negligence on her part, however slight, defeats her right to recover.

The second instruction so given is also complained of in part, which part reads: "And that she was negligently injured by the defendant as charged in the complaint, and you further find said plaintiff was injured, if injured, without any fault of her parents or guardian, you should find for the plaintiff and assess her damages at such sum as will compensate her for the injury sustained, to which you may add punitive damages."

The last clause in this part of the instruction is well objected to. Wilfulness is not charged in the complaint, nor shown by the evidence. For mere negligence, compensatory damages only are allowable, and punitive damages can not be added. We need not examine the errors complained of in refusing to give instructions asked. For the errors in the instructions given, the judgment must be reversed.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs; and that the cause be remanded to the court below, with instructions to grant a new trial, and for further proceedings.

Filed Feb. 1, 1884. Petition for a rehearing overruled April 19, 1884.

No. 11,123.

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145 678

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. DAVIS.

From the Washington Circuit Court.

D. M. Alspaugh and *J. C. Lawler*, for appellant.
S. B. Voyles and *H. Morris*, for appellee.

HAMMOND, J.—Complaint in three paragraphs, by the appellee against the appellant, to recover damages for stock alleged to have been killed on the appellant's railroad by its locomotives and cars.

Demurrer to first and second paragraphs of complaint overruled; answer by general denial; trial by jury; verdict for appellee on first paragraph of the complaint for $150, and for appellant on second and third paragraphs of the complaint; appellant's motion for new trial overruled, and judgment on the verdict. Exceptions were taken to the several rulings, and the same are assigned for error.

The first paragraph of the complaint alleged the killing of the appellee's mare at a place upon the appellant's railroad where it was not securely fenced. It is objected to this paragraph that it does not aver that the animal was killed by the appellee's locomotive or cars, nor that the injury occurred in Washington county. These averments, however, have escaped the attention of the appellant's counsel, as they occur in the first paragraph of the complaint with much particularity.

As the verdict was for the appellee upon the second paragraph of the complaint, there is no available error in the overruling of the demurrer thereto. If a pleading at the trial is found not to be true, the error, if any, of overruling a demurrer to it, is rendered harmless. *State, etc.*, v. *Julian*, 93 Ind. 292.

The causes for a new trial, as set out in the motion, were that the verdict was not sustained by sufficient evidence, and that the damages assessed were too large. The evidence quite strongly supports the verdict, and the amount of the recovery. Judgment affirmed at the appellant's costs.

Filed March 8, 1884.

No. 10,840.

THE BOARD OF COMMISSIONERS OF PORTER COUNTY v. KOSELKE.

From the Porter Circuit Court.

W. Johnston, for appellant.
E. D. Crumpacker and *J. H. Gillett*, for appellee.

ELLIOTT, J.—This case is affirmed on the authority of *Board, etc.*, v. *Dombke*, *ante*, p. 72.

Filed March 8, 1884.

No. 10,497.

ALDERMAN v. COBB.

From the Allen Circuit Court.

S. E. Sinclair and *H. C. Hanna*, for appellant.
R. S. Robertson and *J. B. Harper*, for appellee.

HOWK, C. J.—The only error assigned by the appellant, upon the record of this cause, is the overruling of his motion for a new trial. The only cause for such new trial relied upon, in argument, by the appellant's counsel for the reversal of the judgment, is alleged misconduct of the jury, in this: That two jurors, "whose names are unknown to this defendant," were sleeping during the trial and the argument of the cause.

This is the second statutory cause for a new trial, and must be sustained by affidavit showing its truth. Sections 559 and 562, R. S. 1881. It appears from the transcript, that the appellant did file his own affidavit, in support of this cause for a new trial. But the affidavit was not made a part of the record, either by a bill of exceptions or by an order of court. Therefore, the affidavit is not properly in the record, and can not be considered here. This is settled by many decisions of this court. *Fryberger* v. *Perkins*, 66 Ind. 19; *Williams* v. *Potter*, 72 Ind. 354; *Iles* v. *Watson*, 76 Ind. 359.

We find no error in the record.

The judgment is affirmed with costs.

Filed April 19, 1884.

No. 11,441.

HOPKINS v. GOEBEL ET AL.

From the Washington Circuit Court.

D. M. Alspaugh and *J. C. Lawler*, for appellant.
A. B. Collins and *F. L. Prow*, for appellees.

BLACK, C.—The appellant, to whom William F. Alexander and William R. Logan, partners, had assigned their property in trust for the benefit of their creditors, made a report, not a final one, as such assignee, to which the appellees, creditors of the assignors, filed exceptions, which were in part sustained and in part overruled.

The clerk's entry states that the appellant excepted to the ruling so far as it sustained the exceptions, and that the appellees excepted to the ruling so far as it was adverse to them. The appellant filed a motion for a new trial, which was overruled, whereupon he appealed to this court, assigning as error the overruling of his motion for a new trial. The appellees have assigned as a cross error the overruling of their exception to the report so far as it was overruled.

There was no final judgment, and there was no interlocutory order from which an appeal would lie. Under the decision in *Cravens* v. *Chambers*, 55 Ind. 5, this court has not jurisdiction, and the appeal should be dismissed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the appeal be dismissed, at the appellant's costs.

Filed April 17, 1884.

No. 11,226.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. PIXLEY.

From the Montgomery Circuit Court.

A. D. Thomas, for appellant.

G. W. Paul and *J. E. Humphries*, for appellee.

BICKNELL, C. C.—This was an action by the appellee against the appellant to recover for a horse killed by the appellant's train of cars upon its railroad, where the same was not fenced.

There was a judgment below for the plaintiff. The defendant appealed.

The errors assigned are that the court overruled a demurrer to the complaint, and overruled the defendant's motion for a new trial.

The questions presented by these specifications of error are the same in substance as were decided in the case of *Louisville, etc., R. W. Co.* v. *Shanklin, ante*, p. 297. The appellant in its brief says: "The horses in that case were killed at the same time and at the same *lick* that this horse was, and the evidence is substantially the same in the two cases."

Upon the authority of the case just cited, the judgment of the court below in this case must be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all thing affirmed at the costs of the appellant.

Filed March 29, 1884.

No. 10,945.

SEAVEY v. MAPLES ET AL.

From the Superior Court of Allen County.

P. A. Randall and *W. J. Vesey*, for appellant.

C. H. Aldrich, J. M. Barrett, W. H. Coombs, R. C. Bell and *J. Morris*, for appellees.

FRANKLIN, C.—This case is between the same parties, the same questions are presented, and the same briefs filed, as in the case of *Seavey* v. *Maples, ante*, p. 205, herewith decided. Upon the authority of that case, the judgment in this case must be affirmed.

PER CURIAM.—It is therefore ordered, that the judgment of the court below be and it is in all things affirmed, with costs.

ZOLLARS, J., did not participate, having been of counsel.

Filed March 14, 1884.

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Held, that the complaint alleging these facts was good on demurrer.

Held, also, that the measure of damages, under the facts alleged, could only be the difference between the contract price and the market price at the time and place fixed for delivery; inasmuch as no delivery or tender was alleged, and no proof of facts not alleged could authorize greater damages. *Dwiggins* v. *Clark*, *49*

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See CITY; EVIDENCE, 8; PRINCIPAL AND AGENT; RAILROAD; TRUST AND TRUSTEE.

1. *Foreign Corporation.—Judgment.—Decree of Foreclosure.—Title.—Abatement.*—A decree of foreclosure and title acquired under a sale pursuant thereto by a foreign corporation plaintiff can not be questioned upon the ground that the corporation had not filed a power of attorney as required by section 3022, R. S. 1881, the fact being available only by answer in abatement. *Elston* v. *Piggott*, 14
2. *Same.—Comity.—Right to Purchase, Hold and Convey Lands.*—A foreign corporation, in whose favor a decree is rendered, may, in this State, purchase lands at judicial sale thereon, and hold and convey the same, as there is no statute forbidding it. *Ib.*
3. *Same.—Constitutional Law.—Title to Real Estate.—Forfeiture.*—A foreign corporation had commenced a suit to foreclose a mortgage in the United States Circuit Court before the statute, R. S. 1881, sections 3029, 3030, were enacted, and afterwards obtained a decree. It began another suit against another party in that court after that statute took effect, and still later it became the purchaser of lands sold at judicial sale to satisfy its first decree, and took a deed therefor.

Held, that the corporation took title, notwithstanding the statute, which is void so far as by its terms it undertakes to affect the title. *Ib.*

COSTS.

See EXECUTION, 3; SUPREME COURT, 4.

1. *Witnesses.—Change of Venue.*—Where witnesses are subpœnaed and attend before a justice of the peace, but are not used because of a change of venue taken by the defendant, the costs thereof are taxable to the defendant where he is the losing party. *Teeple* v. *Dickey*, 124
2. The costs of such issues as are found against the prevailing party should be taxed against him. *Knox* v. *Trafalet*, 346

COUNTER-CLAIM.

See PARTIES, 3.

COUNTY.

See CONTRACT, 2; CORONER; COUNTY COMMISSIONERS; NEGLIGENCE, 2, 4 to 6.

COUNTY AUDITOR.

See CORONER.

COUNTY CLERK.

See CLERK OF CIRCUIT COURT.

COUNTY COMMISSIONERS.

See CONTRACT, 2; CORONER; HIGHWAY; NEGLIGENCE, 4; SUPREME COURT, 13.

1. *Pleading.*—Formal pleading is not necessary in presenting claims in the court of county commissioners, and a claim is sufficient if it fully apprise the board of the nature of the claim, and state it with such certainty that a judgment upon it would bar another suit for the same cause. *Board, etc., v. Dombke, 72*
2. *Claim against County.—Exclusive Original Jurisdiction.—Allowance.*—Under the provisions of sections 5758, 5759 and 5760, R. S. 1881, in force since May 31st, 1879, the board of commissioners of each county has exclusive original jurisdiction of every legal claim against such county, and every such claim must be presented to the board for allowance, and no other court can acquire jurisdiction of the claim, except by appeal from the judgment. *Pfaff v. State, ex rel., 529*

COUNTY ORDER.

See CLERK OF CIRCUIT COURT, 4.

COURTS.

See CITY, 3; SUPERIOR COURT.

CRIMINAL CONVERSATION.

1. *Complaint.—Certainty as to Time.—Trespass.—Evidence.*—In an action for damages for criminal intercourse with the plaintiff's wife, the complaint may, as in actions of trespass, lay the time of the alleged wrongful acts with a *continuando*, and the evidence may be directed to any time within that covered by the complaint. *Lemmon v. Moore, 40*
2. *Same.—Motion to Make More Specific.—Continuando.*—Where, in such action, the complaint lays the wrongful acts with a *continuando*, a motion to require the times of the alleged acts of adultery to be more specifically stated should be overruled. *Ib.*
3. *Same.—Bill of Particulars.*—As a general rule, in complaints for torts, a bill of particulars will not be ordered. *Ib.*
4. *Same.—Instructions.—Harmless Error.*—In such action, in the instructions to the jury as a whole concerning the material facts which the plaintiff must establish by a fair preponderance of the evidence, to entitle him to recover, their attention was fairly directed to all of the evidence and circumstances adduced on the trial; but in one of such instructions they were told "If these facts are made out by the *plaintiff's* evidence, to your satisfaction, then you should find for the plaintiff."

Held, that, though such instruction was improper standing alone, it did not mislead the jury, and the error was harmless. *Ib.*

5. *Same.—Falsus in Uno, Falsus in Omnibus.—Witness.*—The rule "*Falsus in uno, falsus in omnibus*," applied to the evidence of a witness, must be directed to *material* evidence; and an instruction which asks the court to apply that rule to the testimony of a witness should be refused unless it so applies the rule. *Ib.*
6. *Same.—Answer to Interrogatory.—Place of Sexual Acts Immaterial.*—Where, in such action, there was no question rendering the venue of any particular acts of illicit intercourse material to the plaintiff's right to recover, the jury committed no available error, in their answer to defendant's interrogatory, in failing to specify the exact place where such acts were committed. *Ib.*

CRIMINAL LAW.

See INTOXICATING LIQUOR.

1. *Rape.—Force without Consent.*—Under section 1917, R. S. 1881, whoever unlawfully has carnal knowledge of a woman forcibly, against her will, is guilty of rape, and where, in such case, there is a carnal connection and no consent in fact, there is in the wrongful act itself all the *force* which the law demands as an element of the crime. *Pomeroy* v. *State*, 96

2. *Same.—Conviction.—Sufficiency of Evidence.*—Where the evidence tends to prove that the prosecutrix "had been afflicted with epileptic fits since she was a year old, which came oftener and harder the older she got," that the defendant, as a physician, under the employment of her parents, made an examination of her person in the presence of her mother, and informed them that she had a terrible womb disease and was losing her mind, and that, as her physician, he afterwards obtained possession and control of her person for the purpose of making a further examination of the alleged disease of the womb, and not for the purpose of sexual intercourse, and that by this means he unlawfully had carnal knowledge of the prosecutrix without her consent in fact, through fraud or otherwise, to the sexual connection, the judgment of conviction will not be reversed by the Supreme Court, on the ground of the insufficiency of the evidence to sustain the verdict, or because it is contrary to law. *Ib.*

3. *Insanity.—Instructions.*—It is not error to instruct, *in a prosecution for murder*, that every man is presumed to be sane and to intend the natural and usual consequences of his own acts. *Sanders* v. *State*, 147

4. *Same.—Intoxication.*—Voluntary intoxication is no excuse for crime. *Ib.*

5. *Same.—Insanity.*—Ungovernable passion is not insanity, and one whose power of will is not impaired by disease, and who, yielding to passion, slays another, is subject to the punishment fixed by law. *Ib.*

6. *Same.—Evidence.*—The legal presumption of sanity stands until the defendant has put in some evidence tending to overthrow it. *Ib.*

7. *Same.*—Evidence in support of the defence of insanity should be scrutinized with care. *Ib.*

8. *Same.*—Direct evidence is not essential, but any fact may be inferred from sufficient circumstances in criminal as in civil cases. *Ib.*

9. *Same.—Witness.—Expert.—Jury.*—The jury is not required by law to give greater weight to the testimony of medical experts than to other witnesses who state facts within their knowledge, but it is for the jury to judge of the weight which each shall receive. *Ib.*

10. *Larceny.—Indictment.*—An indictment for the larceny of "divers goods and chattels of G. G., to wit," enumerating the goods, sufficiently charges the ownership of the goods. *Garber* v. *State*, 219

11. *Advertising Lottery.—Indictment.—Gift Enterprise.*—An indictment, charging that the defendants, at, etc., on, etc., published an advertisement (set out) that they would, on a day named, give to the person buying goods at their store to the amount of fifty cents, and guessing nearest the number of beans in a glass globe in their window, a gold watch, is good, under section 2078, R. S. 1881, making it an offence to advertise a lottery. *Hudelson* v. *State*, 426

12. *Same.—Instructions.—Province of Jury.*—The jury was instructed that they were the judges of the law, and that the instructions of the court were only advisory and might be disregarded; and the next instruction was that the jury had no right to determine the question whether the facts stated in the indictment constituted a public offence, or to determine the sufficiency of the indictment; and if the facts

stated therein were proven beyond a reasonable doubt they must convict.

Held, that the last instruction given, in this order, was a fatal error. *Ib.*

13. *Appeal by State.—Supreme Court.—Quashing Information.—Judgment.*—An appeal may be taken to the Supreme Court by the State from a judgment quashing an information; and, as the defendant may be detained for further proceedings, such judgment is not defective merely because it contains no order for his discharge. *State* v. *Allen*, *441*

14. *Same.—Selling Deadly Weapon to Minor.—Information.*—For information, held sufficient, for selling deadly weapon to a minor, see opinion. *Ib.*

15. *Obstructing Public Highway.—City Street.—Private Way Over and Above Street.—Question of Fact.*—A public street is a public highway, and the wrongful obstruction of a public street is a misdemeanor and is punishable as such, under the provisions of section 1964, R. S. 1881. The erection or maintenance of any structure for private use, such as an enclosed passage way over and above a public street or highway, which obstructs or may obstruct such street or highway, is a misdemeanor within the meaning of the statute, and is punishable as a public nuisance. Whether or not the particular structure, so erected or maintained, obstructs or may obstruct wrongfully the public street or highway, is a question of fact, in every case, for the court or jury trying the cause. *Bybee* v. *State*, *443*

16. *Same.—Waiver.—Supreme Court.*—In criminal, as in civil causes, errors assigned by the appellant, which are not discussed in his brief, are regarded as waived, and are not considered by the Supreme Court. *Ib.*

17. *Indictment.—Motion to Quash.—Plea in Abatement.*—Where the sufficiency of an indictment is questioned, upon grounds which are not apparent on the face of the record, the objection can not be taken advantage of by a motion to quash the indictment, but only by a plea in abatement. *Mathis* v. *State*, *562*

CROSS COMPLAINT.

See DIVORCE.

DAMAGES.

See CONTRACT, 3; DECEDENTS' ESTATES, 4; FRAUD, 2; HIGHWAY, 9; INTERROGATORIES TO JURY, 2; NEGLIGENCE; NUISANCE; PARTIES, 3; PROMISSORY NOTE, 1; RAILROAD, 23; SUPREME COURT, 13.

DECEDENTS' ESTATES.

See DESCENTS; FRAUDULENT CONVEYANCE, 7, 8; HUSBAND AND WIFE, 2; RAILROAD, 8; TAXES, 1.

1. *Sale of Land to Pay Debts.—Jurisdiction.—Judgment.—Irregularity.—Collateral Attack.*—When, upon petition by an administrator for an order to sell his intestate's land to pay debts, the court has jurisdiction over both the subject-matter and the parties interested, a judgment thereon, ordering such sale, can not be collaterally attacked for mere irregularities. *Pepper* v. *Zahnsinger*, *88*

2. *Same.—Order to Sell Widow's Third.*—Such a judgment, so far as it orders the sale of the widow's third, is void. *Ib.*

3. *Same.—Widow may Estop Herself.*—An order of sale of the interests of both the widow and the heirs having been granted, she subsequently requested the administrator, in writing, to sell her interest with the residue; he advertised the sale to be made by him both as agent and administrator, and made sale without objection by her, but made deed as administrator alone; he paid the widow almost the full third of the proceeds; he delivered possession to the purchaser who continued in possession for eight years.

Held, that the widow had estopped herself from claiming title to such land. *Ib.*

4. *Suit on Administrator's Bond.—Pleading.—Nominal Damages.—Supreme Court.*—Complaint on the general bond of an administrator, averring the receipt of $2,000 personal assets, and the sale of real estate, and for breach: 1. Failure to pay money into court as ordered upon removal; 2. Conversion of money of the estate to her own use; 3. Waste in the payment in full of claims not preferred, the estate being insolvent; 4. The wrongful payment of a mortgage debt secured on land sold by her subject to the mortgage; 5. Allowance of unjust claims specified. Answer, that the administrator duly administered the personal estate.

Held, that the answer was good on demurrer except as to nominal damages, and, therefore, overruling the demurrer was not available error.

Held, also, that the fifth breach, if good, which is doubted, would only justify the recovery of a nominal sum.

Held, also, that under the complaint nominal damages only could be given, and for this only the Supreme Court will not award a new trial to the plaintiff. *State, ex rel.*, v. *Cloud*, *174*

5. *Claim.—Joinder of Separate Causes in One Claim.—Action by Widow.—Property of Another Converted by Administrator.*—A claim by a widow against an estate alleged that the decedent, at the death of plaintiff's husband, had possession of all the personal property of the latter, and that, on the death of the decedent, his administrator had converted the same into assets of such estate, and that she was entitled to $500 as widow. A further item of such claim alleged her right to one-third of such property, and demanded damages for its conversion. A third item alleged decedent's occupancy of her husband's land after the death of the latter, and asked recovery for rent of one-third of such land.

Held, on separate demurrer, that each item states a separate cause of action, and was sufficient. *Stapp* v. *Messeke*, *423*

6. *Insolvent Estate.—Priority of Claims.—Widow's Rights.—Administrator's Liability.—Exceptions to Report.*—Where the administrator of an insolvent estate pays out the assets upon general debts, leaving unsatisfied a preferred claim allowed to the widow and also a mortgage upon her interest in the real estate, existing in the decedent's lifetime, he is liable to her, and she may except on these grounds to his final report. *Cunningham* v. *Cunningham*, *557*

7. *Same.—Reference to Master Commissioner.—Judicial Act.*—Notwithstanding the repeal of so much of section 2391, R. S. 1881, authorizing the reference of the final report of an administrator to a master commissioner, such reference may be made by the court, with the consent of the parties, and, though he can not exercise judicial powers, he may report his findings and conclusions of law to the court. *Ib.*

8. *Sale of Land to Pay Debts.—Liens Assumed by Purchaser.—Failure to Pay.—Right of Widow on Foreclosure Against Her.*—Where an administrator, to pay his decedent's debts, sells two-thirds of a tract of land encumbered by a mortgage executed by the decedent and his wife, and the purchaser, as part of the purchase price, assumes the payment of such mortgage, the widow may maintain an action against such purchaser upon the sale of her third under a foreclosure of said mortgage, whether his promise was verbal or in writing, and whether he had executed to the administrator a bond to pay such mortgage or not. *State, ex rel.*, v. *Kelso*, *587*

9. *Same.—Widow's Action Against Administrator.—Complaint.—Insolvency of Purchaser.*—The widow may likewise, even after final settlement of the estate, maintain an action in such case, against the administrator, on

his bond, but, unless her complaint allege the insolvency of such purchaser, it is insufficient. *Ib.*

10. *Same.—Widow's Right, Where Administrator Misapplies Funds.*—She can not, however, while such final settlement stands unrevoked, maintain such action against the administrator for his wrongful act in applying the proceeds of such two-thirds to the payment of other debts and allowing such mortgage to continue a lien upon her third. *Ib.*

DECLARATIONS.

See FRAUDULENT CONVEYANCE, 3; NEGLIGENCE, 7; OFFICIAL BOND, 2.

DEED.

See EVIDENCE, 4; FRAUDULENT CONVEYANCE; JUDGMENT, 1; MARRIED WOMAN, 1 to 4; RAILROAD, 8; REAL ESTATE, ACTION TO RECOVER, 3; TAXES, 1; WILL, 3, 4.

1. *Infant Grantee.—Acceptance.—Delivery.—Evidence.—Pleading.—Quieting Title.—Conveyance by Parent to Child.*—A complaint by a father against his daughter to quiet title alleged title in the plaintiff, the making and recording of a deed by the plaintiff to the defendant, then a child of five years, without her knowledge, and that the deed was never delivered to her, but always retained by the plaintiff. It was also alleged that the plaintiff retained the possession, and improved the property and made and recorded the deed only to avoid an unfounded claim against him, upon which suit was threatened.

Held, that, as the ultimate fact of non-delivery was distinctly alleged, the complaint was good on demurrer.

Held, also, that the circumstances of the transaction, as alleged, were merely evidence upon which the court could not, as a matter of law, determine on demurrer that there was a delivery, notwithstanding the express averment that there was none. *Vaughan* v. *Godman*, *191*

2. *Same.—Delivery.*—For a valuable collection of authorities as to what constitutes delivery of a deed, see opinion. *Ib.*

3. *Description.*—The description of land in a deed by metes and bounds, giving a definite corner of a certain city lot as the commencement, and thence courses and distances which will close, is good. *Meikel* v. *Greene*, *344*

DEFAULT.

See HUSBAND AND WIFE; 1; JUDGMENT, 2.

DELIVERY.

See CONTRACT, 3; DEED, 1, 2.

DEMAND.

See PARTITION; REPLEVIN, 3.

DEMURRER.

See ATTACHMENT AND GARNISHMENT; PLEADING, 1, 2, 5; PRACTICE, 9, 11; RAILROAD, 17; STATUTE OF LIMITATIONS, 1; SUPREME COURT, 16.

DEMURRER TO EVIDENCE.

See PRACTICE, 9.

DEPOSITARY.

See PARTIES, 3.

DESCENTS.

See HUSBAND AND WIFE, 2; WILL, 7, 8.

1. *Devise.—Estoppel.—Husband and Wife.*—The consent by a husband that

his wife may devise her real estate to her child by a former marriage does not estop him from asserting title, after her death, to one-third of the premises, under section 2485, R. S. 1881. *Roach* v. *White*, 510

2. *Husband and Wife.—Judicial Sale of Real Estate.—Wife's Inchoate Interest.—Widow's Third.—Statute Construed.*—Under execution issued upon a simple personal judgment, certain of the debtor's real estate was sold by the sheriff to the creditor, and the land not having been redeemed, he obtained a sheriff's deed therefor. Such creditor having died, his heirs brought an action of partition against the debtor's wife. The evidence showed that the two-thirds of the land sold was worth much more than the amount of the debt for which it was sold, and that the debtor's other property and that sold were worth more than $10,000, and less than $20,000.

Held, under section 2508, R. S. 1881, that the wife is entitled to one-third, notwithstanding the proviso in section 2483, R. S. 1881.
Mansur v. *Hinkson*, 395

DESCRIPTION.

See DEED, 3; HIGHWAY, 3; REAL ESTATE, ACTION TO RECOVER, 3; TAXES, 1.

DILIGENCE.

See CONTINUANCE; NEW TRIAL, 3, 4.

DISAFFIRMANCE.

See EVIDENCE, 4; INSANITY; MARRIED WOMAN, 1 to 3.

DISCRETION.

See CITY, 3; PRACTICE, 21.

DISMISSAL.

See PRACTICE, 12; REPLEVIN, 1.

DIVORCE.

See SPECIFIC PERFORMANCE, 4.

1. *Pleading.—Evidence.—Decree.*—Under section 1040, R. S. 1881, the defendant in a divorce suit may not only file an answer, but also a cross petition, and the court may decree the divorce to the defendant upon evidence introduced by the plaintiff only. *Glasscock* v. *Glasscock*, 163

2. *Same.—Alimony.*—Where such cross petition is filed by the wife, asking a divorce and for alimony, the burden of proof as to the alimony is upon her, and if no proof be introduced bearing on that question, she can not complain that no alimony is awarded her. *Ib.*

DRUNKENNESS.

See CRIMINAL LAW, 4; RAILROAD, 12.

EJECTMENT.

See EVIDENCE, 7; NEW TRIAL, 1, 2; PARTITION; REAL ESTATE, ACTION TO RECOVER.

ELECTION.

See JUSTICE OF THE PEACE.

EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, 7 to 10; PRINCIPAL AND AGENT; RAILROAD, 10.

ESTOPPEL.

See DECEDENTS' ESTATES, 3; DESCENTS, 1; MORTGAGE, 3; PARTITION; SPECIFIC PERFORMANCE, 4; TAXES, 1.

Estoppel in Pais.—Representation or Concealment of Facts.—Knowledge of Facts.—Ignorance of Facts.—Intention to Deceive.—Inducement to Act.—Where it appeared that R. E. K. had represented to J. W. W., to induce the latter to exchange his stock of goods for certain described real estate in Blackford county, in which D. D. K. had an interest, that D. D. and G. E. K. were the sole owners of such real estate, and had entered into a written obligation for the conveyance thereof within a reasonable time, by a good and sufficient warranty deed, in consideration of the delivery of said stock of goods to D. D. K., the brother of R. E. K., and had put J. W. W. in possession of the real estate; that J. W. W. relied upon the representations of R. E. K., and was induced thereby to act in the premises; and that afterwards R. E. K. had acquired an interest in the real estate, outstanding at the time in the name of his sister, of which he had knowledge and J. W. W. was ignorant,

Held, that R. E. K. is thereby estopped from asserting, as against J. W. W. and those claiming under him, his after-acquired interest in the real estate in controversy. *Karnes* v. *Wingate*, *594*

EVIDENCE.

See ARBITRATION AND AWARD, 3 to 5; ATTACHMENT AND GARNISHMENT, 1; BASTARDY; CONTINUANCE; CONTRACT, 1, 3; CRIMINAL CONVERSATION, 1, 4, 5; CRIMINAL LAW, 2, 6 to 9; DEED, 1; DIVORCE; FRAUD, 4; FRAUDULENT CONVEYANCE, 3, 9, 11, 13; HIGHWAY, 9; INSTRUCTION TO JURY, 2, 3, 5; INTERROGATORIES TO JURY, 2; INTOXICATING LIQUOR; MASTER COMMISSIONER, 1 to 3; NEGLIGENCE, 1, 2, 7, 8, 11; NEW TRIAL, 3 to 7, 9; OFFICIAL BOND, 2; PRACTICE, 1 to 4, 9, 14, 17, 19, 21, 24; PRINCIPAL AND SURETY, 2; PROMISSORY NOTE, 6; RAILROAD, 6, 7, 13, 19, 23; SPECIFIC PERFORMANCE, 3; SUPREME COURT, 1 to 3, 5 to 9, 14, 19, 21, 22, 26, 31 to 33, 36, 39; TAXES, 1, 2; WILL, 1, 4.

1. *Harmless Error.*—To reject evidence tending to corroborate another witness as to a material fact, is a harmless error. *Hadley* v. *Hood*, *119*
2. *Lost Instrument.—Proof of Contents.—Evidence.*—Where the action is upon a written instrument alleged to be lost, the loss of such instrument, like any other fact stated in the complaint, is to be established by a fair preponderance of the evidence before parol proof of the contents of the instrument is admissible. *Johnston, etc., Co.* v. *Bartley*, *131*
3. *Presumption.—Age.*—In the absence of evidence the presumption is that a person is an adult. *Garber* v. *State*, *219*
4. *Disaffirmance of Deed by Minor.*—A written notice of disaffirmance of a deed executed by a minor may be given in evidence under a paragraph which alleges disaffirmance either in general terms or by setting out such notice specially. *George* v. *Brooks*, *274*
5. *Witness.—Opinion.—Non-Expert.*—When it is material to prove that a person was of fickle mind, a witness, not an expert, who was well acquainted, is competent to give his opinion upon the subject, based upon facts to which he had testified. *Mills* v. *Winter*, *329*
6. *Same.—Immateriality.—Error.*—The admission of immaterial evidence is not available error. *Ib.*
7. *Ejectment.*—In ejectment for part of a city lot, the recorded plat of the lot is proper evidence for the plaintiff. *Meikel* v. *Greene*, *344*
8. *Non-Residence of Corporation.—Attachment.*—An allegation that a defendant in an attachment suit is a foreign corporation may be proved by oral evidence. *North Chicago, etc., Co.* v. *Hyland*, *448*
9. *Grounds of Incompetency.*—An objection to evidence as incompetent should point out the grounds of such objection. *Harvey* v. *Huston*, *527*

EXCEPTION.

See MASTER COMMISSIONER, 1, 2; SUPREME COURT, 7, 36.

EXECUTION.

See SHERIFF'S SALE.

1. *Exemption.—Pleading.—Exhibits.*—An execution defendant may, on filing the proper schedule, select the property which shall be exempt, at any time before or after levy, prior to sale; to this end a substantial and not a literal compliance with the statute is required, and in pleading that he took the steps required by the statute, it is not necessary to exhibit the schedule. *State, ex rel.*, v. *Read*, *103*

2. *Same.—Construction of Statute.*—The statute exempting property from execution, as well as proceedings under it, must be liberally construed, not only in behalf of the defendant, but also of the officer holding the execution, when it is sought to hold him liable for failure to make the money. *Ib.*

3. *Supreme Court.—Appeal.—To Stay Proceedings Bond must be Filed.—Mandate Against Clerk.*—Where an appeal to the Supreme Court is taken during term time, from a judgment for costs, and time is granted for the filing of an appeal bond, execution will not be stayed until such bond is filed; and, if such bond be not filed, the clerk of the court below may be compelled, by mandate, to issue such execution, though the time for filing such bond has not yet expired. *Mitchell* v. *Gregory*, *363*

EXEMPTION.

See EXECUTION, 1, 2.

EXHIBITS.

See EXECUTION, 1; GUARDIAN AND WARD, 3; PARTIES, 3; PLEADING, 10 to 12.

EXPERT.

See CRIMINAL LAW, 9; EVIDENCE, 5.

FALSE IMPRISONMENT.

Answer.—An answer, in an action for false imprisonment, justifying under a warrant, must show that the arrest was the same trespass as charged in the complaint. *Young* v. *Warder*, *357*

FEES AND SALARIES.

See CORONER.

FENCE.

See RAILROAD, 7, 9 to 11, 16 to 22, 29.

FINDING.

See ATTACHMENT AND GARNISHMENT, 4; NEW TRIAL, 8; SPECIAL FINDING; WILL, 5.

FORECLOSURE.

See CORPORATION; DECEDENTS' ESTATES, 8; HUSBAND AND WIFE, 1; MORTGAGE; NEW TRIAL, 1, 2; RAILROAD, 8.

FOREIGN CORPORATION.

See CORPORATION; EVIDENCE, 8; PRINCIPAL AND AGENT; TRUST AND TRUSTEE.

FORFEITURE.

See CORPORATION.

FORMER ADJUDICATION.

See TOWN TREASURER, 1.

1. Whenever a matter is adjudicated and finally determined by a court of competent jurisdiction, it is forever at rest. *State, ex rel.*, v. *Krug*, 366

2. *Same.—Grounds of Former Decision.*—In the trial court, final judgment was rendered against the plaintiff upon the overruling of the demurrer to the answer for insufficiency, and, upon his appeal to the Supreme Court, the judgment below was affirmed upon the ground that such demurrer should have been carried back to the complaint and sustained, whereupon the plaintiff commenced a new action for the same cause, and the defendants properly pleaded such former adjudication. *Held*, that the answer is sufficient. *Ib.*

3. *Same.—Who may Plead.*—A former adjudication in favor of several defendants is a good defence to a subsequent action upon the same cause against any of such defendants. *Ib.*

FRAUD.

See ATTACHMENT AND GARNISHMENT, 3, 4; ESTOPPEL; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE, 1; MARRIED WOMAN, 6; MORTGAGE, 4, 5; REPLEVIN BAIL; WILL, 6.

1. *False Representations.—Lease of Coal Mine.—Pleading.*—A complaint by the lessee against the lessor of a coal mine, which could not be examined, showing that by representations of material matters known by the lessor to be false, he induced the plaintiff to take the lease which was of less value than if the statements had been true, specifying the particulars, contains a good cause of action. *Arbuckle* v. *Biederman*, 168

2. *Complaint.—Bargain and Sale.*—A complaint for damages for fraud practiced upon the plaintiff, by the defendant, in an exchange of lands, is insufficient when there is no allegation that any such exchange had ever been made, nor that any loss otherwise had been sustained by the plaintiff on account of the fraud alleged. *Bish* v. *Van Cannon*, 263

3. *Complaint.—Fraudulent Representations by Agent.*—Where, in an action against H. and others upon contract, the complaint alleges that the defendants, as obligors, agreed with the obligee that, to obtain from the latter the loan of U. S. bonds, they would execute their obligation to him, and that subsequently they had, through their agent, obtained the delivery of such bonds upon the false and fraudulent representations of said agent, that such obligation had been executed by the defendants, the complaint is insufficient, as against H., for want of an averment that at the time such bonds were so delivered he had not yet executed such bond. *Hayes* v. *Burkum*, 317

4. *Same.—Authority of Agent.—Evidence.—Principal and Surety.*—The fact that H. agrees to become surety upon a bond yet to be executed, pursuant to a loan negotiated by B., does not tend to establish an agency in B. to bind H. upon a parol contract on the same terms, by which B. subsequently obtained the loan. *Ib.*

5. *Same.*—The fact that B. had authority to negotiate a loan as the agent of H. and others, by the terms of which they were to obtain such loan upon executing an obligation to the person making the loan, would not authorize B. to subsequently obtain such loan upon his false and fraudulent representations that such obligation had been duly executed. *Ib.*

FRAUDULENT CONVEYANCE.

1. *Mortgage.—Judgment.*—To a complaint by creditors to set aside a fraudulent conveyance, the grantee pleaded as a counter-claim that he took the deed in satisfaction of a mortgage on the land, taken in good faith, and praying protection as mortgagee. To this there was a general denial, and an answer that the mortgage was taken in fraud of

creditors, and these issues, and also the issues on the original complaint, were found for the plaintiff.

Held, that a decree setting aside the deed and ordering a sale of the land free from any claim of the grantee was justified by the finding.
Hadley v. *Hood*, *119*

2. *Complaint.*—For a good complaint by a creditor, to set aside a conveyance of his debtor made to defraud creditors, see opinion.
Hogan v. *Robinson*, *138*

3. *Same.—Evidence.—Declarations.*—In such case declarations of the debtor made after the conveyance were proper evidence to show his intent. *Ib.*

4. *Same.—Husband and Wife.*—A conveyance to a wife for full value in payment of money borrowed from her, without notice of any fraudulent intent, is good as against other creditors. *Ib.*

5. *Same.—Burden of Proof.*—A conveyance can not be impeached for fraud by creditors, if the debtor retain ample property, in his own name, subject to execution, to satisfy all his debts, and upon this subject the burden of proof is on the creditor who attacks the conveyance. *Ib.*

6. *Complaint to Set Aside.—Judicial Sale.—Notice of Fraud to Purchaser.*—In an action to set aside a conveyance of real estate on the ground of fraud, where the complaint shows that the defendant's grantor derived his title through the medium of an intervening judicial sale, in good faith, for value and without notice of the alleged fraud, the complaint is bad on demurrer, even though it shows that the conveyance of the defendant was without any valuable consideration.
Moore v. *Trimble*, *153*

7. *Action Against Debtor's Heirs by Creditor.—Limitation.—Administrator a Necessary Party.—Final Settlement Unrevoked.—Collateral Attack.*—In an action by a judgment creditor against the heirs of a deceased insolvent debtor, to set aside an alleged fraudulent conveyance by the debtor to said heirs, the debtor's administrator is a necessary party to the action; and where, in such action, it appears from the complaint, that, more than three years prior to the commencement of such action, the debtor's estate had been finally settled, in due course of administration, and that such settlement remains unrevoked, the action can not be maintained, and the complaint is insufficient. *Vestal* v. *Allen*, *268*

8. *Same.*—Even if such settlement had been made within less than three years prior to the commencement of such action, as long as it remains unrevoked such action will not lie. *Ib.*

9. *Evidence.*—To authorize the setting aside of a conveyance as fraudulent, the evidence must show that the grantor, at the time of its execution, did not have enough other property subject to execution to pay his debts, and that the conveyance was either without consideration, or that the grantee accepted it with knowledge of the grantor's fraudulent purpose. *Andrews* v. *Flanagan*, *383*

10. *Complaint.—Insolvency.*—In an action to set aside a conveyance as fraudulent, an averment, that the debtor "has not now, nor has he since the note was executed had, any property subject to execution more than the exemption allowed by law," is sufficient.
Simpkins v. *Smith*, *470*

11. *Same.—Evidence.—Vendor and Vendee.*—When in such suit the vendee only denies the fraud imputed to her, it is unnecessary to read in evidence the endorsements upon the notes, as the plaintiff's title to the notes is not put in issue. *Ib.*

12. *Same.—Instruction.*—When in such suit it is admitted that the vendees did not have, nor has either of them since the debt was created had, any property subject to execution, it is not error to instruct the jury

that if the property was conveyed and accepted for the purpose of defrauding the vendor's creditors, such conveyance was fraudulent and void. *Ib.*

13. *Same.—Hearsay Evidence.*—The statements of the vendee's father, that he intended to give her the land subsequently conveyed by him to her husband, was mere hearsay, and inadmissible. *Ib.*

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GIFT ENTERPRISE.

See CRIMINAL LAW, 11.

GUARDIAN AND WARD.

See PRACTICE, 17.

1. *Filing Accounts.*—Where a guardian files accounts of his guardianship as required by law, and the court makes no order approving them, such reports conclude nobody. *State, ex rel.,* v. *Roche, 372*

2. *Same.—Education and Maintenance.*—A guardian is not entitled to credit for sums expended in the education and maintenance of his ward, unless the ward had no parents able to provide therefor, or unless such parents were unwilling to do so. *Ib.*

3. *Same.—Bond.—Approval.—Complaint.*—A complaint on a guardian's bond, which exhibits a copy of the bond and the clerk's approval thereof, sufficiently shows that the bond was approved. *Ib.*

HARMLESS ERROR.

See CRIMINAL CONVERSATION, 4; EVIDENCE, 1; INSTRUCTIONS TO JURY, 3; NUISANCE; PLEADING, 4; PRACTICE, 1, 4, 10, 11, 16, 20; RAILROAD, 13; SUPREME COURT, 14, 15, 17, 19, 26, 31, 37, 40.

HEIRS.

See DESCENTS; FRAUDULENT CONVEYANCE, 7; HUSBAND AND WIFE, 2; INSANITY; WILL.

HIGHWAY.

See CRIMINAL LAW, 15; NEGLIGENCE, 2; RAILROAD, 18, 20; SUPREME COURT, 13.

1 *Vacation of.—Location of Bridge.—County Commissioners.—Injunction.—Pleading.*—Complaint to enjoin the erection of a bridge upon plaintiff's land. Answer that the *locus in quo* was a public highway; that a proper order had been made vacating the highway upon certain conditions to be performed by the petitioners therefor, which had not been performed. Reply showing by proper averments a lawful petition to vacate that part of the way and establish it elsewhere, notice thereof, and an order by the board granting the prayer upon report of viewers, and that the new way was opened by the proper authority, and made as good as the old.

Held, that the answer was good, also the reply. *Kyle* v. *Board, etc., 115*

2. *Same.*—In a proper case wrongful entry on land to make a public way or bridge may be prevented by injunction. *Ib.*

3. *Description of Location.—Certainty.*—It is sufficiently certain, in a petition for a highway, to so describe the proposed highway that a surveyor may locate the same. *Conaway* v. *Ascherman, 187*

4. *Same.—Petition.—Notice.—Public Utility.—Owners' Names.*—Such petition need not aver that notice has been given, nor that the proposed highway will be of public utility, but should state the names of the owners of lands over which it will run, even in cases where the location of a highway is asked to be changed. *Ib.*

5. *Same.—Essential Averment.—Petitioners.*—Such petition should aver not only that the petitioners are freeholders, but that six of them reside in the immediate neighborhood of the highway, or it will be fatally defective. *Ib.*

6. *Location of.—County Commissioners.—Order not Fixing Width Void.*—An order by a board of commissioners, locating and directing the opening but not fixing the width of a public highway, is void. *Erwin* v. *Fulk*, 235

7. *Same.—Injunction Against Supervisor.—Trespass.*—A board of commissioners ordered a change in a certain highway, but their order did not fix the width of the new road, and a copy of the order was placed in the hands of a supervisor, to be executed, whereupon the owner of a farm brought suit to enjoin the supervisor from so doing, alleging in his complaint the foregoing facts, and also that the new road would cut his farm into irregular shaped tracts, cut in two his orchard, change the frontage of his buildings and necessitate the construction of much new fence.

Held, on demurrer, that injunction will lie, that the injury alleged in the complaint is not a mere trespass, and that under the provisions of section 1141, R. S. 1881, it is not necessary that the injury contemplated be irreparable, but such only as would produce great harm to the plaintiff during the litigation. *Ib.*

8. *Location of.—Appeal from County Commissioners.—Practice.*—On appeal from an order of the board of commissioners establishing a highway, questions not properly made before the board, and not affecting its jurisdiction, can not be made in the circuit court. *Lowe* v. *Ryan*, 450

9. *Same.—Evidence.—Opinion of Witnesses as to Benefits and Damages.—Instructions.—Jury.*—On appeal on the question of damages, the remonstrant, amongst other things, called witnesses who gave their opinion that the value of his lands would not be enhanced by the proposed highway, and the petitioners were allowed in rebuttal, over objection, to put in opinions of witnesses to the effect that the value would be increased.

Held, that the remonstrant could not, under such circumstances, claim that the judgment should, on this ground, be reversed.

Held, also, that instructions, which left the jury at liberty to consider these opinions, with the other evidence, were not erroneous. *Ib.*

HUSBAND AND WIFE.

See CRIMINAL CONVERSATION; DESCENTS; FRAUDULENT CONVEYANCE, 4; INSANITY; MARRIED WOMAN; PARTITION; SPECIFIC PERFORMANCE, 3, 4.

1. *Judgment Lien.—Foreclosure of Mortgage.—Action to Set Aside Default.—Fraud.—Injunction.*—In an action by the mortgagee against a husband and wife and a judgment creditor of the husband, to foreclose a mortgage upon the real estate of the husband alone, executed by both him and his wife before such judgment had become a lien thereon, the judgment creditor, upon the promise of the mortgagee that judgment of foreclosure should be taken against both the husband and the wife, did not appear, but suffered default, whereupon the action was dismissed as to the wife, foreclosure was taken against the husband and the judgment creditor only, and the judgment provided that any surplus on the sale should be paid into court for the husband. Suit by the judgment creditor to set aside the default and to enjoin sale on said foreclosure, alleging the foregoing facts, and also alleging that a conspiracy had been formed between the mortgagee, the husband and his wife, and her father, by which, in order to defeat the claim of the judgment creditor, the share of the wife in the real estate should not be sold, and that any deficiency in satisfying the mortgage debt would

be satisfied by the wife's father by paying such deficiency to the mortgagee.

Held, on demurrer, that the complaint was insufficient, and that no grounds lay for an injunction, as the wife had a right to save her interest in the land, the judgment of her husband's creditor not being a lien on her interest. *De Armond* v. *Preachers' Aid Society*, 59

2. *Judicial Sale of Real Estate.—Wife's Inchoate Interest.—Descents.—Widow's Third.—Statute Construed.*—Under execution issued upon a simple personal judgment, certain of the debtor's real estate was sold by the sheriff to the creditor, and the land not having been redeemed, he obtained a sheriff's deed therefor. Such creditor having died, his heirs brought an action for partition against the debtor's wife. The evidence showed that the two-thirds of the land sold was worth much more than the amount of the debt for which it was sold, and that the debtor's other property and that sold were worth more than $10,000, and less than $20,000.

Held, under section 2508, R. S. 1881, that the wife is entitled to one-third, notwithstanding the proviso in section 2483, R. S. 1881.

Mansur v. *Hinkson*, 395

INDICTMENT.

See CRIMINAL LAW, 10, 11, 17.

INFANT.

See DEED, 1; EVIDENCE, 3, 4; MARRIED WOMAN, 1 to 4; NEGLIGENCE, 7 to 9.

INFORMATION.

See RAILROAD, 25, 26.

INJUNCTION.

See HIGHWAY, 1, 2, 7; HUSBAND AND WIFE, 1.

INSANITY.

See CRIMINAL LAW, 3 to 7; WILL, 1, 6.

Contract.—Mortgage by Insane Wife.—Disaffirmance by Heirs.—To a suit to foreclose a mortgage executed by husband and wife, on his lands, both being then dead, the wife having survived the husband, the heirs of the wife answered that she was insane when the mortgage was executed and so continued during life, and that the mortgage was given to secure a debt of the husband. Reply: 1. That when the mortgage was executed the wife was apparently sane, and was never judicially declared insane, and never disaffirmed the mortgage; that the plaintiff had no notice of her insanity, and took the mortgage in good faith to secure a loan to the husband, and it had not been disavowed by the wife or her heirs; 2. Alleging the same facts, and, also, that after the date of the mortgage she was treated by her family as a sane person in all respects; that the loan, $6,000, was expended by the husband in the purchase of other lands; that the loan is wholly unpaid; that the husband died insolvent, and sale of the whole of the mortgaged lands will be required to repay the loan.

Held, that the answer was good, and both paragraphs of the reply were bad. *North-Western, etc., Ins. Co.* v. *Blankenship*, 535

INSOLVENCY.

See ATTACHMENT AND GARNISHMENT, 3; BANKRUPTCY; DECEDENTS' ESTATES, 6, 9; FRAUDULENT CONVEYANCE, 7 to 12.

INSTRUCTIONS TO JURY.

See BILL OF EXCEPTIONS, 1; CRIMINAL CONVERSATION, 4, 5; CRIMINAL

LAW, 3, 12; FRAUDULENT CONVEYANCE, 12; HIGHWAY, 9; INTOXICATING LIQUOR; NEGLIGENCE, 9; PRACTICE, 13, 20; RAILROAD, 9, 18, 19; SUPREME COURT, 6, 7, 14, 15, 37; WILL, 1.

1. *How Requested.*—Instructions requested, which are not signed by the party asking them, or by his attorney, may be refused without error. *Beatty* v. *Brummett*, 76

2. *Credibility of Witnesses.*—An instruction, that when evidence can not be reconciled the jury have the right to believe the witnesses deemed most worthy of credit, and disbelieve those least worthy of credit, and that in weighing evidence it is proper to consider the circumstances surrounding the witnesses, and from a preponderance of the evidence determine the rights of the parties, is not objectionable on behalf of the defendant, if the jury is also told that the plaintiff has the burden of the issue, and can not recover unless by a preponderance of the evidence he proves the averments of his complaint. *Lake Erie, etc., R. W. Co.* v. *Parker*, 91

3. *Evidence.—Harmless Error.*—A mistake in stating to the jury that a fact is averred in the complaint, which only appears by necessary implication, is harmless. So, also, in enumerating the facts necessary to entitle the plaintiff to recover, the omission of an essential fact, which is, however, shown by the evidence without conflict, is harmless. *Drum* v. *Stevens*, 181

4. An instruction is not erroneous merely because it does not give all the law connected with the matter to which it relates. *Garber* v. *State*, 219

5. *Error in Giving or Refusing.—Record.—Evidence.—Supreme Court.*—In the absence of the evidence from the record, no available error can be predicated upon the instructions given, unless they are erroneous as mere abstract propositions of law, nor upon the instructions refused, for, even if they state the law correctly, the Supreme Court will presume they were properly refused as inapplicable to the case made by the evidence. *Louisville, etc., R. W. Co.* v. *Harrigan*, 245

6. An instruction asked may be refused if its substance be given in another form. *Louisville, etc., R. W. Co.* v. *White*, 257

7. *Same.*—Imperfection in a single instruction is not available error, if other instructions given, taken in connection with it, fairly declare the law. *Ib.*

8. *Practice.*—Where a party desires the court to call the attention of the jury to any particular aspect of his defence, he must prepare and request the proper instruction. *Simpkins* v. *Smith*, 470

9. *Same.*—There is no error in refusing to give an instruction, though correct as an abstract proposition, where it is not applicable to the case made by the evidence. *Ib.*

INSURANCE.

Marriage Benefit.—Wagering Contract.—Inseparable Consideration.—A marriage benefit contract of insurance promised a certain sum of money to the payee, by a certain time, upon his marriage to a lady named, between certain dates, provided the payee gave the makers "the exclusive right to carry 'marriage benefit insurance' on him" and his intended.

Held, on demurrer to a complaint by the payee, against the makers, alleging performance, that the condition giving the makers such "exclusive right to carry" such insurance was a wagering contract, not separable from the other part of the consideration, and that, therefore, the whole contract is illegal and void. *James* v. *Jellison*, 292

INSURRECTION.

See RAILROAD, 15.

INTENTION.

See FRAUDULENT CONVEYANCE, 3; WILL, 2, 4.

INTEREST.

See PROMISSORY NOTE, 1.

INTERPLEADER.

See PARTIES, 3.

INTERROGATORIES TO JURY.

See CRIMINAL CONVERSATION, 6; SUPREME COURT, 15, 18.

1. *When Part of Record.*—Interrogatories will not be considered a part of the record unless it affirmatively appears that they were submitted by the court to the jury. *Aiken* v. *Ising*, 507

2. *Same.—Evidence.—Verdict.—Damages.—Supreme Court.*—Where it does not appear that interrogatories were thus submitted, an answer that $30 of an item not sufficiently proved was allowed will not be considered, and if the evidence as to the other items is sufficient to support the general verdict, the damages assessed will not be deemed excessive. *Ib.*

INTOXICATING LIQUOR.

See CRIMINAL LAW, 4.

Sale by Agent.—Instruction.—Where, in a prosecution for an unlawful sale of intoxicating liquor, the evidence tends to show that the sale was made by the bartender of the defendant in his presence, it is not error to instruct the jury, that if an agent of the defendant, in his presence and with his knowledge and consent, made such a sale, the defendant would be liable. *Hofner* v. *State*, 84

JUDGMENT.

See ATTACHMENT AND GARNISHMENT, 2, 3; CORPORATION; CRIMINAL LAW, 13; DECEDENTS' ESTATES, 1 to 3; FRAUDULENT CONVEYANCE, 1; HUSBAND AND WIFE, 1; MORTGAGE, 6; PARTNERSHIP; PLEADING, 3, 8; PRACTICE, 6 to 9, 18, 22; PROMISSORY NOTE, 1; REPLEVIN, 1, 2; REPLEVIN BAIL; SPECIFIC PERFORMANCE, 4; SUPREME COURT, 18, 35, 38; TOWN TREASURER, 1.

1. *Lien.—Priorities.—Sheriff's Sale.— Deed.—Title.*—Lands were conveyed in good faith by A., but the purchaser neglected to have the deed recorded. Two judgments were afterwards rendered against A., and upon execution issued upon the junior judgment there was a sale of the land to a purchaser who had no notice of the conveyance, and in proper time a sheriff's deed was made to him, which was recorded. A like sale and deed were afterwards made under the senior judgment to a purchaser without notice.

Held, that the judgments were not liens upon the land. R. S. 1881, sections 608, 752.

Held, also, that the purchaser at the first sheriff's sale took title, and the purchaser at the second sale, though under the senior judgment, took nothing. *Pierce* v. *Spear*, 127

2. *Default.—Ten Days' Service.—Statute Construed.*—Where a judgment by default was rendered on the tenth day after the day on which the summons in the cause was served, computing the time by excluding the day of service, and including the return day of the writ, the service was sufficient under section 315 of the civil code of 1852, as amended by the act of March 6th, 1877 (Acts 1877, p. 105). *Kerr* v. *Haverstick*, 178

3. *Relief From.—Inexcusable Neglect.—Attorney's Negligence.*—The neglect of an attorney to plead a valid and proper defence, or to attend the trial, either intentionally or through forgetfulness, and his failure for like reasons to notify his client of the time of trial, whereby a judg-

ment is wrongfully obtained against the client, furnishes no ground for relief against the judgment. *Sharp* v. *Moffitt*, *240*

4. *Same.*—The inadvertence, mistake or neglect of an attorney affords no ground for relief against a judgment unless it would have been excusable if imputed to the client. *Ib.*

JUDICIAL SALE.

See CORPORATION; DECEDENTS' ESTATES, 1 to 3, 8 to 10; DESCENTS, 2; FRAUDULENT CONVEYANCE, 6; HUSBAND AND WIFE, 2; MARRIED WOMAN, 5; PARTITION; TENANTS IN COMMON.

JURISDICTION.

See BANKRUPTCY; COUNTY COMMISSIONERS, 2; DECEDENTS' ESTATES, 1; PLEADING, 5.

JURY.

See CRIMINAL CONVERSATION, 6; CRIMINAL LAW, 9, 12; HIGHWAY, 9; INSTRUCTIONS TO JURY; PRACTICE, 12, 13, 14, 20; WILL, 5.

JUSTICE OF THE PEACE.

See COSTS, 1.

Office and Officer.—Election and Appointment.—Where three persons were elected to the offices of justice of the peace, in a certain township, at the April election, 1882, one of whom qualified to succeed himself, on the 15th day of April, 1882, another failed to qualify, and the incumbent of the third resigned and was appointed to fill the vacancy occasioned by the failure of the second to qualify, and took possession of the books and papers pertaining to the former officer.

Held, that when the remaining justice qualified he became entitled to the office books and papers pertaining thereto, formerly held by such appointee. *Morris* v. *State, ex rel.*, *565*

LANDLORD AND TENANT.

See FRAUD, 1.

1. *Cropper not Insurer Against Weather.*—One who agrees to farm the land of another and to deliver to the latter his share in grain is bound to use only ordinary care in gathering the crop, and is not an insurer against loss from bad weather. *Brown* v. *Owen*, *31*

2. *Growing Crops.—Trespass.*—Where there is a lease for years, rent to be paid by delivery to the landlord of a certain share of the crops when mature, the crops while growing and before delivery are the property of the tenant, and he can maintain suit for trespass thereto even against one who purchases the land from the landlord. *Chicago, etc., R. W. Co.* v. *Linard*, *319*

3. *Same.—Railroads.*—In such case, a grant by the landlord to a railroad company is no defence to a suit by the tenant for injury to crops growing on the lands so granted. *Ib.*

LARCENY.

See CRIMINAL LAW, 10.

LEASE.

See FRAUD, 1; LANDLORD AND TENANT, 2.

LIEN.

See DECEDENTS' ESTATES, 8, 10; HUSBAND AND WIFE, 1; JUDGMENT, 1; MORTGAGE, 3; NEW TRIAL, 1; PARTNERSHIP.

LIFE-ESTATE.

See QUIETING TITLE; WILL, 3.

LIS PENDENS.

See MORTGAGE, 7.

LOST INSTRUMENT.

See EVIDENCE, 2.

LOTTERY.

See CRIMINAL LAW, 11.

MANDAMUS.

See CORONER; EXECUTION, 3; SUPREME COURT, 28.

Amendment of Complaint and Writ.—Abatement.—In a proceeding for a mandate, where an amended complaint is filed in the name of the State, it is proper to amend the writ accordingly, and no error was committed in refusing to quash the writ or in sustaining a demurrer to a plea of abatement to such writ because of such amendment. *Morris* v. *State, ex rel.*, 565

MARRIAGE.

See INSURANCE.

MARRIED WOMAN.

See DESCENTS; FRAUDULENT CONVEYANCE, 4; HUSBAND AND WIFE; INSANITY; PARTITION; SPECIFIC PERFORMANCE, 3, 4.

1. *Infancy.—Conveyance of Real Estate.*—An infant *feme covert* may convey or encumber her lands, in this State, by deed or mortgage in which her husband joins. *Losey* v. *Bond*, 67
2. *Same.—Disaffirmance of Conveyance.*—Such deed or mortgage is voidable, and may be affirmed or disaffirmed by such person after she attains full age. *Ib.*
3. *Same.—Disaffirmance, How Made.*—An infant's conveyance of land in this State is disaffirmed by the execution of a deed of such land to another after such infant attains full age. *Ib.*
4. *Same.—Affirmance of Conveyance.—Mortgage.*—An infant's mortgage of land in this State is affirmed by the execution of a deed of such land to another after such infant attains full age, when such deed recites that the conveyance is made subject to such mortgage. *Ib.*
5. *Judicial Sale of Husband's Equitable Interest in Lands.*—Where lands of a husband, held by equitable title, are sold under judicial proceedings, the inchoate interest of the wife is vested, by the statute, section 2508, R. S. 1881, upon the execution of a sheriff's deed to the purchaser. *Shelton* v. *Shelton*, 113
6. *Parties.—Husband and Wife.—Statute Construed.*—A suit by a wife for deceit in obtaining a conveyance of her lands concerns her separate property, and section 254, R. S. 1881, authorizes her to sue alone in such case. *Mills* v. *Winter*, 329
7. *Power to Mortgage her Real Estate.—Security for Debt or Liability.—Law Prior to May 31st, 1879.*—Under the law of this State, as it existed prior to May 31st, 1879, when "An act concerning married women," approved March 25th, 1879, took effect, a married woman had full power, her husband joining with her, to execute a valid mortgage on her separate lands, howsoever acquired by her, to secure the debt or liability of her husband. *Frazer* v. *Clifford*, 482
8. *Same.—Effect of Act of March 25th, 1879.—Repeal by Implication.*—The act of March 25th, 1879, concerning married women, contained no re-

pealing clause or section, but it repealed by necessary implication so much, and only so much, of the previously existing law as was inconsistent or in conflict with the provisions of the later act. Thus, while the later act deprived a married woman of all power "to mortgage or in any manner encumber her separate property, *acquired by descent, devise or gift*," it did not limit or restrain her power to mortgage or encumber her separate property, *acquired by contract or purchase*, as it existed before such act took effect. *Ib.*

9. *Same.—When Mortgage Valid.*—A mortgage given by a married woman and her husband on her separate real estate, acquired by her contract or purchase, to secure the debt of her husband, after the act of March 25th, 1879, concerning married women, took effect, and while it remained in force, is a valid and binding mortgage. *Ib.*

10. *Promissory Note.—Endorsement by Married Woman.—Liability of Assignor.—Act of March 25th, 1879.—Construction of Statute.*—At common law, the assignment or endorsement of a promissory note, by a married woman, simply operated to transfer her title to the note to the assignee or endorsee thereof. But where, after "An act concerning married women," approved March 25th, 1879, took effect and while it remained in force, a married woman assigned by endorsement a promissory note, negotiable under the statute and not by the law merchant, she and her separate estate, real and personal, are liable on her contract of assignment, "the same as if she were sole," upon execution or other judicial process; and no subsequent change, modification or even repeal of the provisions of such act will affect or impair the obligation of her contract of assignment. *Mathes* v. *Shank*, *501*

MASTER AND SERVANT.

See NEGLIGENCE, 7 to 10; PRINCIPAL AND AGENT; RAILROAD, 10.

MASTER COMMISSIONER.

1. *Report of.—Evidence.—Record.—Supreme Court.—Exception.*—Where the evidence is not in the record, no question is presented to the Supreme Court by an exception to the report of a master commissioner, questioning the correctness of its findings. *Cunningham* v. *Cunningham*, *557*

2. *Same.—Failure to Report Evidence.*—Where the order of reference to a master commissioner does not require him to report the evidence, an exception on the ground that he had failed to report such evidence is not available. *Ib.*

3. *Same.—Bill of Exceptions.*—In such case, a party may make the evidence part of the record by a bill of exceptions signed by the master commissioner. *Ib.*

4. *Same.—Reference to Master Commissioner.—Judicial Act.*—Notwithstanding the repeal of so much of section 2391, R. S. 1881, as authorizes the reference of the final report of an administrator to a master commissioner, such reference may be made by the court, with the consent of the parties, and, though he can not exercise judicial powers, he may report his findings and conclusions of law to the court. *Ib.*

MEASURE OF DAMAGES.

See CONTRACT, 3; NEGLIGENCE, 11; PROMISSORY NOTE, 1; RAILROAD, 24.

MINOR.

See CRIMINAL LAW, 14; DEED, 1; EVIDENCE, 3, 4; MARRIED WOMAN, 1 to 4; NEGLIGENCE, 7 to 9.

MISJOINDER.

See DECEDENTS' ESTATES, 5; NEW TRIAL, 2.

MISTAKE.

See JUDGMENT, 3, 4; WILL, 1.

MORTGAGE.

See CHATTEL MORTGAGE; CORPORATION; DECEDENTS' ESTATES, 8, 10; FRAUDULENT CONVEYANCE, 1; HUSBAND AND WIFE, 1; INSANITY; MARRIED WOMAN, 4, 7 to 9; NEW TRIAL, 1, 2; RAILROAD, 8.

1. *Contract.—Sheriff's Sale.—Redemption.—Consideration.—Promise.*—Where, to secure a loan of money to the execution defendant for the purpose of satisfying the judgment, by parol agreement, the lender takes a sheriff's deed of the borrower's land, in pursuance of a purchase by him upon the execution sale, the transaction constitutes a mortgage in equity, and a subsequent release of the borrower's rights in the land is a sufficient consideration for a promise to pay money. *Beatty* v. *Brummett*, *76*

2. *Release of.—Principal and Surety.*—When the principal in a note executes a mortgage to his surety to secure the payment of such note, and the surety afterwards becomes the owner of the land, releases the mortgage, executes another to his creditor, who is the payee's attorney, and who transfers such mortgage to another, the payee of such note may foreclose such mortgage against such surety and the holder of such second mortgage. *Mitchell* v. *Fisher*, *108*

3. *Same.—Estoppel.*—In such action an answer by the holder of such second mortgage, that the mortgagee was informed by the payee of the note, before he took such mortgage, that such payee did not have nor intend to claim any lien upon said land by virtue of the first mortgage, does not constitute an estoppel. *Ib.*

4. *Negligence in Execution.—Fraud.*—One who executes a mortgage without knowing its contents will not, unless prevented by artifice or trick for which the mortgagee is responsible, be relieved because its contents were not as the latter represented them, there being no relation of trust or confidence between the parties. *Robinson* v. *Glass*, *211*

5. *Same.—Agent.*—The employment of a trusted kinsman and friend or an agent of the mortgagor to misrepresent the contents of a mortgage, whereby its execution is obtained without reading, is a fraud against which relief will be granted. *Ib.*

6. *Same.—Consideration. —Judgment. — Payment. — Attorney's Fees.—Collateral Attack.*—A mortgage executed in payment of a judgment, held by the mortgagee against the mortgagor, is founded on a valuable consideration, and satisfies the judgment, nor can the allowance in the judgment of a sum for attorney's fees be questioned in a suit to foreclose the mortgage. *Ib.*

7. *Lis Pendens.—Notice.—New Trial as of Right.—Statute Construed.*—Where one brings ejectment and is defeated, and within the year allowed by statute takes a new trial upon which he recovers, a mortgagee with actual notice, who takes his mortgage after the first judgment and before the new trial is taken, is not protected by section 1066, R. S. 1881, as having acquired an interest in good faith. *Smith* v. *Cottrell*, *379*

8. *Priority.—Release as to Second Purchaser Releases First.—Pleading.*—Certain land, encumbered by a recorded mortgage, was platted into town lots by the mortgagor, who sold one lot to M. and then one lot to P., retaining the residue. Each paid for his lot and entered into possession thereof, but P., before paying, required and obtained the release of his lot from such mortgage, his payment exceeding the amount of the mortgage. The mortgagee then transferred the mortgage to S., who had no notice of M.'s purchase, the latter's deed not being on record. S. then foreclosed the mortgage, in an action against the mort-

gagor and P., and against all of said lots. S. afterwards brought an action against M. and P., to compel the former to redeem and for foreclosure against him, and also to quiet title against P. To an answer by M., setting up the foregoing facts, a demurrer was filed.

Held, that the release of the mortgage as to P. released M. also, and, therefore, that the answer was sufficient. *Stewart* v. *McMahan*, 389

MUNICIPAL CORPORATIONS.

See CITY; RAILROAD, 3; TOWN TREASURER.

NAMES.

See HIGHWAY, 4.

NEGLIGENCE.

See JUDGMENT, 3, 4; MORTGAGE, 4; PROMISSORY NOTE, 2; RAILROAD, 5, 10, 12, 14, 15.

1. *Personal Injury.—Evidence.—Res Gestæ.*—In a suit for personal injury resulting from negligence, what is said at a time of suffering as to the character of the pain or hurt is admissible for the plaintiff, not extending to a narrative of a past transaction. *Board, etc.*, v. *Dombke*, 73
2. *Same.—Bridges.—Highway.*—In a suit against a county, on account of injuries resulting from a defective bridge, evidence of the condition of the highway connecting with the bridge, and the frequency of its use by travellers, is admissible, so that the jury may have knowledge of the place where the injury occurred. *Ib.*
3. *Same.—Damages.*—In a suit for injury caused by negligence, the state of the injury as it exists at the time of trial may be shown, and damages may be given for permanent injury. *Ib.*
4. *Same.—County Commissioners.—Care of Bridges.*—Ordinary care is required of a county in constructing and maintaining its bridges, that is, such care as a prudent man would use in his own affairs where the whole risk would be his own, and the degree of this care must be in proportion to the magnitude of the injury likely to result from neglect. *Ib.*
5. *Same.—Notice.*—In such cases actual notice of defects is not essential to liability, but their existence for such a period that they ought to have been discovered will be sufficient. *Ib.*
6. *Same.*—The use of a bridge by one who knows its defects does not forbid his recovery for injury if the danger be such that it could be prudently encountered, and if he use care proportioned to the known danger. *Ib.*
7. *Action by Parent Against Employer of Child.—Injury Resulting in Death.—Evidence.—Declarations of Deceased.—Railroad Company.—Employment of Minor.*—In an action by a widowed mother against a railroad company for damages for the death of her minor son, employed by the defendant without her consent, wherein the complaint alleged that the deceased came to his death by reason of injuries received by him while performing certain dangerous work at which he had been put by the defendant, and in which he was unskilled, declarations by the deceased, made prior to the accident, that he was skilled in such labor, are inadmissible in evidence against the plaintiff. *Pennsylvania Co.* v. *Long*, 250
8. *Same.—Presumption.*—Employment of such minor, without the parent's consent, will, in the absence of other evidence, be presumed to be against the parent's will. *Ib.*
9. *Same.—Instruction Assuming Negligence From Dangerous Employment.—Machinery.*—An instruction is erroneous in such case, which assumes that the defendant was culpably negligent merely because the em-

ployment in which the deceased was engaged was dangerous, and the different parts of the machinery were not adapted to each other. *Ib.*

10. *Master and Servant.—Complaint.*—In a suit by one not a servant against a master to recover damages resulting from his servant's negligence, the complaint may impute the servant's negligence directly to the master. *Haywood* v. *Hedrick, 340*

11. *Evidence.—Measure of Damages.*—In a suit for an injury as the result of mere negligence, the case can not be made unless it be proven that negligence of the plaintiff did not contribute to the injury, and punitive damages can not be given. *Louisville, etc., R. W. Co.* v. *Shanks, 598*

12. *Contract.—Negligence in Making.*—Where one of sound mind neglects to exercise ordinary prudence in the making of a contract, courts will not grant relief therefrom. *Robinson* v. *Glass, 211*

13. *Same.—Neglect to Read Contract.*—It is, as a general rule, negligence on the part of one who can but does not read an instrument which he executes, or if, being unable to read, he fails to exercise ordinary prudence in requiring the instrument to be read to him; *aliter*, if any trick or artifice is resorted to which prevents an opportunity for so doing. *Ib.*

NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 3, 4.

NEW TRIAL.

See MORTGAGE, 7; SUPREME COURT, 3, 9, 39.

1. *New Trial, of Right.—Action for Possession or to Quiet Title.—Mortgage.—Tax Lien.*—A new trial, as of right, should be granted under section 1064, R. S. 1881, in actions for the possession of or to quiet title to real estate, but not in actions to foreclose a mortgage or a tax lien. *Butler University* v. *Conard, 353*

2. *Same.—Misjoinder of Actions.*—An action to recover possession of land can not properly be joined with an action to foreclose a mortgage thereon, and if such actions be improperly joined, a new trial as of right ought not to be granted, even where the misjoinder has not been objected to, and, if granted, the order granting it should be vacated and such new trial refused. *Ib.*

3. *Newly Discovered Evidence.—Diligence.—Affidavit of Witness.*—The showing in support of a new trial, on the ground of newly discovered evidence, must show that diligence has been used, and the facts constituting the diligence must be stated. The affidavits of the witnesses by whom such facts can be established must accompany the showing. *Gardner* v. *State, ex rel., 489*

4. *Same.—Refusal of Witness to Make Affidavit.*—The refusal of the witness to make the affidavit is not sufficient, as the court, upon application, will compel the witness to make the affidavit. *Ib.*

5. *Practice.—Absence of Evidence.—Supreme Court.*—Where the only causes assigned for a new trial are, that the verdict is not sustained by sufficient evidence and is contrary to law, the alleged error of the circuit court in overruling the motion for a new trial, in the absence of the evidence from the record, presents no question for the decision of the Supreme Court. *Hartlep* v. *Cole, 513*

6. *Evidence.—Bill of Exceptions.*—A motion for a new trial, based on alleged errors arising upon evidence, which refers to the evidence as set forth in a bill of exceptions not yet filed, presents no question. *Harvey* v. *Huston, 527*

7. *Same.—Cause for.*—A motion for a new trial, upon a question of evidence, should clearly specify the evidence in question. *Ib.*

8. *Practice.*—Inconsistency between a general verdict and special findings is not available on motion for a new trial.
North-Western, etc., Fire Ins. Co. v. *Blankenship, 535*

9. *Evidence.*—A reason for a new trial, on account of the admission of evidence, must specify what the evidence was; a reference to a bill of exceptions not then made or filed is not sufficient. *Cain* v. *Goda, 555*

10. *Mortgage.—Lis Pendens.—Notice.—New Trial as of Right.—Statute Construed.*—Where one brings ejectment and is defeated, and within the year allowed by statute takes a new trial upon which he recovers, a mortgagee with actual notice, who takes his mortgage after the first judgment and before the new trial is taken, is not protected by section 1066, R. S. 1881, as having acquired an interest in good faith.
Smith v. *Cottrell, 379*

NOMINAL DAMAGES.

See DECEDENTS' ESTATES, 4; NUISANCE.

NON-USER.

See RAILROAD, 18.

NOTICE.

See FRAUDULENT CONVEYANCE, 6; HIGHWAY, 4; MORTGAGE, 7; NEGLIGENCE, 5; PRINCIPAL AND AGENT; PROMISSORY NOTE, 2; RAILROAD, 12; SALE, 1; SUPREME COURT, 12.

NUISANCE.

See CRIMINAL LAW, 15.

Complaint for Damages for Obstructing Street.—Nominal Damages.—Harmless Error.—In an action by a lot owner, against an adjoining proprietor, for damages resulting from an obstruction alleged to have been placed by the defendant in a public street used by the plaintiff, and to abate the alleged obstruction, the complaint should allege special injury to the plaintiff, beyond facts showing merely nominal damages; and, in such an action, the sustaining of a demurrer for insufficiency to a complaint showing merely nominal damages is not available error in the Supreme Court. *Waltman* v. *Rund, 225*

OFFICE AND OFFICER.

See CITY, 4; CLERK OF CIRCUIT COURT; CORONER; COUNTY COMMISSIONERS; EXECUTION, 3; HIGHWAY, 7; JUSTICE OF THE PEACE; MASTER COMMISSIONER; OFFICIAL BOND; TOWN TREASURER.

OFFICIAL BOND.

See DECEDENTS' ESTATES, 4; TOWN TREASURER.

1. *Principal and Surety.—Answer by Sureties.—Discharge.—New Bond.*—In a suit upon an official bond, an answer by sureties, that the sureties on a former bond had, upon proper application, in term obtained an order from a judge *pro tem.* discharging them, which, however, was never entered of record, and thereupon the bond sued on was executed, is bad.
Harvey v. *State, ex rel., 159*

2. *Same.—Evidence.*—Conversations between the principal and sureties prior to the approval of the bond, and without the knowledge of the officers charged with the acceptance, are not admissible in evidence on behalf of the sureties. *Ib.*

OPINION.

See EVIDENCE, 5; HIGHWAY, 9; SUPREME COURT, 2.

OWNERSHIP.

See CRIMINAL LAW, 10; LANDLORD AND TENANT, 2, 3.

PARENT AND CHILD.

See DEED, 1; GUARDIAN AND WARD, 2; NEGLIGENCE, 7 to 9.

PARTIES.

See FORMER ADJUDICATION, 3; FRAUDULENT CONVEYANCE, 7; MARRIED WOMAN, 6; PARTNERSHIP; PLEADING, 11; REPLEVIN, 2; SUPREME COURT, 12, 13, 25, 29, 30.

1. *Joint Plaintiffs.—Demurrer.*—A complaint by several jointly, which fails to show a joint cause of action in all, is bad on demurrer for the want of sufficient facts. *Darkies* v. *Bellows*, *64*

2. *Appeal.*—It is only parties affected by the judgment who are required by statute to be made parties to an appeal to the Supreme Court. *Hogan* v. *Robinson*, *138*

3. *Determination of Conflicting Claims.—Depositary.—Counter-Claim.—Practice.—Contract.—Exhibit.*—The plaintiffs sued R. and B., averring that there was a sum of money in R.'s hands which he refused to pay, and in which B. claimed an interest. R. answered that the money was in his hands, as the plaintiffs had averred, but under a written contract with the plaintiffs, exhibited, that he should pay B. out of it any sum due B. from the plaintiffs upon a certain contract between B. and the plaintiffs, and that B. claimed the whole, and he offered to pay as the court should direct, and prayed that the controversy between the plaintiffs and B. be determined. B. filed a pleading in which he set up his contract with the plaintiffs and breaches thereof, the receipt of the money by R. as averred in R.'s answer, and prayed judgment for his damages against the plaintiffs, and that R. pay the money in his hands to B. The plaintiffs answered this pleading and B. replied.

Held, that B. might recover judgment against the plaintiffs in that action for a greater sum than was in R.'s hands, and that R. pay the latter upon it.

Held, also, that B.'s claim against the plaintiffs was not founded on the written contract between the plaintiffs and B., and, therefore, need not be made a part of his pleading. *Irvin* v. *Ratliff*, *583*

PARTITION.

Effect on Title Afterwards Acquired.—Demand.—Ejectment.—Estoppel.—Tenants in Common.—A., holding and claiming title to two-thirds undivided of a tract of land acquired by purchase from the assignee in bankruptcy of B., brought suit against the wife of B., who by reason of the sale had, under the statute, become the owner in fee of the remaining third. At the same time A. held by assignment a certificate of purchase of the whole tract, made to satisfy a decree against B. and wife upon a mortgage executed by both, the time for redemption not having expired at the termination of the suit for partition which resulted in assigning to A. and the wife of B. in severalty shares as above. Subsequently, A. by reason of non-redemption took a deed upon the certificate.

Held, that A. was not estopped by the decree in partition from asserting the new title thus acquired.

Held, also, that the certificate acquired by A. while a tenant in common with B.'s wife did not inure to the benefit of both, inasmuch as their co-tenancy did not give rise to any relation of trust or confidence.

Held, also, that A. might maintain ejectment against the wife of B. without calling upon her to redeem, or demanding possession. *Elston* v. *Piggott*, *14*

PARTNERSHIP.

See PRACTICE, 18.

Lien.—Subrogation.—Parties.—Complaint.—Judgment.—While W. D. and H.

D. were partners in a milling business, G. recovered a judgment against H. D., then insolvent, for an individual debt. The firm at the time was largely involved, and afterwards became insolvent, when H. D. conveyed his interest in the firm property to W. D., subject to the firm debts. G. then obtained a decree against W. D. and H. D. setting aside this conveyance, and subjecting H. D.'s interest in the property to the payment of his judgment. W. D. then paid off some of the partnership debts, and then formed a new firm with two strangers, conveying each an undivided third, the new firm to pay off the debts of the old firm, and make large repairs upon the mill, which they did. In a suit by the members of the new firm to have these payments of the debts of the old firm, and for repairs, declared a lien on the property prior to the lien of G.'s judgment, these facts were averred in the complaint, and also that G. claimed priority and was threatening to sell on execution.

Held, that the complaint was bad on demurrer. *Dill* v. *Voss*, *590*

PAYMENT.

See MORTGAGE, 6; PRACTICE, 17.

PERSONAL PROPERTY.

See ATTACHMENT AND GARNISHMENT, 3; CONTRACT, 3; CRIMINAL LAW, 10; FRAUD, 3; LANDLORD AND TENANT; RAILROAD, 7, 9, 10, 11, 15, 16, 21; REPLEVIN; SALE; TAXES.

PHYSICIAN.

See CRIMINAL LAW, 2.

PLEADING.

See ARBITRATION AND AWARD, 5; ATTACHMENT AND GARNISHMENT, 1 to 3; CONTRACT, 2, 3; COUNTY COMMISSIONERS, 1; CRIMINAL CONVERSATION, 1 to 3; CRIMINAL LAW, 10, 11, 13, 14, 17; DECEDENTS' ESTATES, 4, 5, 9; DEED, 1; DIVORCE; EVIDENCE, 4; EXECUTION, 1; FALSE IMPRISONMENT; FORMER ADJUDICATION, 2, 3; FRAUD, 1 to 3; FRAUDULENT CONVEYANCE, 2, 6, 10; GUARDIAN AND WARD, 3; HIGHWAY, 1; MANDAMUS; MORTGAGE, 8; NEGLIGENCE, 10; NUISANCE; OFFICIAL BOND, 1; PARTIES, 1, 3; PARTNERSHIP; PRACTICE, 5, 10, 11, 15, 16, 18; PROMISSORY NOTE, 3 to 5; QUIETING TITLE; RAILROAD, 1, 2, 5, 10, 11, 13, 16, 17, 25; REAL ESTATE, ACTION TO RECOVER, 1, 2; SPECIFIC PERFORMANCE, 1; STATUTE OF LIMITATIONS, 1; SUPREME COURT, 16, 17, 20, 30, 34, 35; TOWN TREASURER, 1.

1. *Abatement.—Practice.*—Under R. S. 1881, section 365, if an answer in abatement be filed with paragraphs in bar, it may be stricken out, but sustaining a demurrer to it is not available error. *Driggins* v. *Clark*, *49*

2. *Complaint.—Statement of Facts.—Demurrer.—Motion.*—Where the complaint omits a material fact necessary to the plaintiff's cause of action, a demurrer for the want of sufficient facts will be sustained; but the only remedy for a defective or imperfect statement of facts is a motion to make the complaint more certain and specific in that respect. *Johnston, etc., Co.* v. *Bartley*, *131*

3. *Plea in Abatement and in Bar.—Judgment.*—A judgment, if it can be successfully pleaded at all, can not be pleaded in abatement, but only in bar. *Harvey* v. *State, ex rel.*, *159*

4. *Denial.—Harmless Error.*—Where the general denial is pleaded, there is no injury in sustaining a demurrer to an argumentative denial. *Drum* v. *Stevens*, *181*

5. *Jurisdiction.—Demurrer.*—A demurrer to a complaint for want of sufficient facts presents no question as to the jurisdiction of the court. *Whitewater R. R. Co.* v. *Bridgett*, *216*

6. *Practice.*—There is no available error in sustaining a demurrer to a special denial, if the general denial be also pleaded.
Hamilton v. *Browning*, 242

7. *Practice.*—Where the general denial is pleaded, other paragraphs averring facts provable under the general denial are useless, and there is no available error in holding them bad on demurrer.
Haywood v. *Hedrick*, 340

8. *Same.—Defects Cured.*—Where the fault of a complaint is merely that the facts are defectively stated, the fault is cured by verdict, and is not available in arrest of judgment or in error. *Ib.*

9. *Answer to Suit on Bond.*—In a suit upon a bond each breach assigned, with the introductory averments, is regarded as a separate paragraph of complaint, with a view to making issue, and an answer in bar of the whole action, not sufficient as to one of the breaches assigned, is bad on demurrer. *State, ex rel.*, v. *Roche*, 372

10. *Exhibits.—Practice.—Presumption.*—When a pleading is founded upon a written instrument, the original, or a copy thereof, must be filed with the pleading; such instrument should also be designated so as to be identified, but if it follows the pleading it will be presumed to be the instrument referred to. *McCormick, etc., Co.* v. *Glidden*, 447

11. *Complaint.—Supreme Court.*—Where the only objections to the sufficiency of a complaint are, that it states, in one paragraph, several items of indebtedness on different accounts, and fails to aver that either or all of them are due and unpaid, and that the bill of particulars therewith filed fails to show that the items therein were between the parties to the suit, such objections come too late and afford no ground for the reversal of the judgment, when presented for the first time, after verdict and judgment, by an assignment of error in the Supreme Court that the complaint does not state facts sufficient to constitute a cause of action. *Hartlep* v. *Cole*, 513

12. *Complaint on Appeal Bond.*—A complaint on a bond in the usual form, given on appeal to the Supreme Court, which properly alleges the judgment, the appeal from it, the execution of the bond, making it an exhibit, and alleges that the judgment was affirmed and remains unpaid, is good. *Heshion* v. *Scott*, 570

POSSESSION.

See REAL ESTATE, ACTION TO RECOVER, 3; REPLEVIN, 1, 3; SPECIFIC PERFORMANCE, 2.

PRACTICE.

See ATTACHMENT AND GARNISHMENT, 1, 2, 4; BILL OF EXCEPTIONS; CONTINUANCE; COSTS; CRIMINAL CONVERSATION, 2 to 4, 6; CRIMINAL LAW, 16; DECEDENTS' ESTATES, 7; DIVORCE; EVIDENCE, 1, 2, 6, 9; EXECUTION, 3; HIGHWAY, 8, 9; INSTRUCTIONS TO JURY; MANDAMUS; MASTER COMMISSIONER; NEW TRIAL; PARTIES; PLEADING, 1, 2, 4, 6 to 8, 10; RAILROAD, 13, 17; SPECIAL FINDING; STATUTE OF LIMITATIONS, 1; SUPREME COURT; VERDICT; WILL, 4, 5; WITNESS.

1. *Evidence.—Harmless Error.*—Where the answer to an improper question is harmless, there is no available error. *Brown* v. *Owen*, 31

2. *Same.—Immaterial Evidence.*—Where the answer to a question asked could not, of itself, be material, and there is no offer to prove other facts which would make such answer material, the sustaining of an objection to such question is not erroneous. *Ib.*

3. *Same.—Motion to Strike out Evidence not Objected to.*—Where evidence is admitted without objection, a subsequent motion to strike it out comes too late. *Ib.*

4. *Same.—Immaterial Evidence.*—The admission of evidence which, though immaterial, is harmless, is not available error. *Ib.*

5. *Pleading.*—The overruling of a motion to strike out part of a pleading does not constitute an available error. *Losey* v. *Bond, 67*

6. *Same.—Judgment.*—An error in sustaining a demurrer to an answer in bar of a personal judgment is not an available error, where no such judgment is rendered. *Ib.*

7. *Motion in Arrest.—When Made.*—A motion in arrest must be made *before* the rendition of judgment; otherwise it comes too late to present any question. *Hansher* v. *Hanshew, 208*

8. *Same.—Motion by Plaintiff.—Sufficiency of Complaint.*—A motion in arrest of judgment calls in question the sufficiency of the complaint, after verdict; and where the only issue for trial was formed by a general denial of the complaint, and the finding or verdict was for the defendant, the plaintiff's motion in arrest of judgment will present no question for decision. *Ib.*

9. *Motion in Arrest After Demurrer to Evidence.*—A defendant does not waive his right to test the sufficiency of the complaint by a motion in arrest, by demurring to the plaintiff's evidence.

Quære, does the defendant's demurrer to the plaintiff's evidence waive his right on appeal to question the overruling of his demurrer questioning the sufficiency of the complaint? *Bish* v. *Van Cannon, 263*

10. *Harmless Striking Out of Part of Pleading.*—The striking out of part of a paragraph of a pleading is harmless, where the same facts are set out in a remaining paragraph. *George* v. *Brooks, 274*

11. *Same.—Harmless Ruling on Demurrer.*—The sustaining of a demurrer for insufficiency to one paragraph of a pleading is harmless, when the same facts are alleged in a remaining paragraph. *Ib.*
McClelland v. *Louisville, etc., R. W. Co., 276*

12. *Motion to Dismiss After Jury Retires.*—It is too late to ask leave to dismiss an action after the jury trying the same has retired to consult upon their verdict. *McClelland* v. *Louisville, etc., R. W. Co., 276*

13. *Same.—Court May Correct Erroneous Instruction.*—A trial court may rightfully correct an erroneous instruction, upon the return of the jury into court requesting that the instructions again be read to them. *Ib.*

14. *Argument to Jury.—Directing Verdict.*—Where the evidence is without conflict, and there is no question of fact arising upon it, the court may refuse to permit argument to the jury, and may direct a verdict.
Meikel v. *Greene, 344*

15. *Waiver.*—A defendant who obtains an order on the plaintiff to separate his causes of action and have them separately docketed, and then pleads to the whole complaint, without taking action to enforce the order, waives it. *State, ex rel.,* v. *Roche, 372*

16. *Same.—Harmless Error.*—When the general denial is pleaded, it is a harmless error to sustain a demurrer to another paragraph merely alleging facts equivalent to the denial or admissible in evidence under it. *Ib.*

17. *Same.—Payment.*—In a suit on a guardian's bond, for conversion of the ward's money and a failure to pay, etc., payment in whole or in part is provable under the general denial. *Ib.*

18. *Arrest of Judgment—Complaint.*—A complaint upon an assigned partnership account, which does not state the consideration for the assignment, and does not aver a settlement of the partnership affairs, is sufficient upon a motion in arrest of judgment. *Kious* v. *Day, 500*

19. *Evidence.*—The record on appeal must show that objection or exception

was taken to the introduction of the evidence complained of, to present the question, in the Supreme Court, of its admissibility.
Bush v. *Banta*, 509

20. *Verdict.—Instructions.—Harmless Error.*—Where, upon the material and undisputed facts in the case, the verdict could not have been otherwise, the Supreme Court will not inquire whether a challenge to a juror was improperly overruled, nor whether instructions were erroneously given or refused, as, in such case, such errors would not reverse the judgment. *Morris* v. *State, ex rel.*, 565

21. *Same.—Discretion as to Admission of Evidence.*—After the parties have rested it is in the discretion of the court to admit other evidence; for this purpose it is unnecessary to set aside the submission, but this is not necessarily erroneous. *Ib.*

22. *Supreme Court.*—Where the judgment gives proper relief, and in addition thereto other relief not proper, but no objection has been made to the judgment and no motion to modify it, the Supreme Court will not reverse. *Earle* v. *Simons*, 573

23. *Trial.—Postponement.*—An affidavit in support of a motion to postpone a trial for one day, because of the absence of a party whose presence is necessary, which shows no excuse for such absence, is not sufficient.
Irvin v. *Ratliff*, 583

24. An objection to evidence as incompetent should point out the grounds of such objection. *Harvey* v. *Huston*, 527

PRESUMPTION.

See CONTRACT, 2; CRIMINAL LAW, 3, 6, 8; EVIDENCE, 3; INSTRUCTIONS TO JURY, 5; NEGLIGENCE, 8; PLEADING, 10; SPECIFIC PERFORMANCE, 4.

PRINCIPAL AND AGENT.

See DECEDENTS' ESTATES, 3; FRAUD, 3 to 5; INTOXICATING LIQUOR; MORTGAGE, 5.

Master and Servant.—Principal's Liability for Act of Former Agent.—Notice of Revocation.—A foreign corporation, operating in this State through an agent, leased its works to the agent, who, without authority from such corporation, continued to operate the works in its name, and retained in his service an employee of the corporation without notice to him of the change.

Held, in an action by the employee against the corporation, that the latter is liable for the value of such service.
North Chicago, etc., Co. v. *Hyland*, 448

PRINCIPAL AND SURETY.

See CLERK OF CIRCUIT COURT, 4; FRAUD, 4; MORTGAGE, 2, 3; PROMISSORY NOTE, 2; REPLEVIN BAIL.

1. *Official Bond.—Answer by Sureties.—Discharge.—New Bond.*—In a suit upon an official bond an answer by sureties, that the sureties on a former bond had, upon proper application, in term obtained an order from a judge *pro tem.* discharging them, which, however, was never entered of record, and thereupon the bond sued on was executed, is bad.
Harvey v. *State, ex rel.*, 159

2. *Same.—Evidence.*—Conversations between the principal and sureties prior to the approval of the bond, and without the knowledge of the officers charged with the acceptance, are not admissible in evidence on behalf of the sureties. *Ib.*

PROMISE.

See DECEDENTS' ESTATES, 8; MORTGAGE, 1.

PROMISSORY NOTE.

See ATTACHMENT AND GARNISHMENT, 3; MARRIED WOMAN, 10.

1. *Interest After Maturity.—Measure of Damages.—Interest on Judgment.*—An interest-bearing promissory note, which is silent as to interest after its maturity, will thereafter bear the same rate of interest as it lawfully bore before maturity, and such rate of interest will be the proper measure of damages in an action upon the note. While the act of February 5th, 1873, regulating interest on judgments (1 R. S. 1876, p. 600, *note* 1), remained in force, it was lawful to provide in the judgment that it should bear the same rate of interest expressed in the note upon which it was rendered *Kerr* v. *Haverstick, 178*

2. *Principal and Surety.—Creditor's Failure to Sue.—Release of Surety.—Written Notice to Creditor by One of Two Sureties.—Effect of Such Notice.*—The mere neglect or failure of the payee or holder of a promissory note to bring suit thereon, at or after its maturity, in the absence of the "notice in writing" requiring him "forthwith to institute an action upon the contract," as provided in section 1210, R. S. 1881, will not exonerate or discharge a surety in the note from liability thereon; and where such notice has been given by one of two or more sureties, it can not be made available to the discharge of the surety or sureties, who gave no such notice, from liability on such note. *Cochran* v. *Orr, 433*

3. *Suit by Assignee.—Averment of Title.*—In a suit upon a promissory note by the assignee of the payee, an averment in the complaint, that "the payee assigned the note to the plaintiff by endorsement," is sufficient. *Simpkins* v. *Smith, 470*

4. *Same.—Fraudulent Conveyance.—Complaint.—Insolvency.*—In an action to set aside a conveyance as fraudulent, an averment, that the debtor "has not now, nor has he since the note was executed had, any property subject to execution more than the exemption allowed by law," is sufficient. *Ib.*

5. *Same.*—The fact that one of the notes sued upon was not due did not render the paragraph, based upon both, bad. *Ib.*

6. *Same.—Evidence.—Vendor and Vendee.*—When in such suit the vendee only denies the fraud imputed to her, it is unnecessary to read in evidence the endorsements upon the notes, as the plaintiff's title to the notes is not put in issue. *Ib.*

PUBLIC POLICY.

See INSURANCE.

PUBLIC SQUARE.

See CITY, 5.

PUNITIVE DAMAGES.

See NEGLIGENCE, 11.

QUIETING TITLE.

See DEED, 1; NEW TRIAL, 1; REAL ESTATE, ACTION TO RECOVER, 2; TAXES.

Complaint.—Sheriff's Sale —Life-Estate.—A complaint to quiet title against a claim of title by the defendant founded upon a sheriff's sale, which alleges merely that the interest of a tenant for life was sold by the sheriff, without averring that the plaintiff's remainder in fee was *not* also sold, is bad on demurrer. *Darkies* v. *Bellows, 64*

QUO WARRANTO.

See RAILROAD, 25 to 28.

RAILROAD.

See LANDLORD AND TENANT, 3; NEGLIGENCE, 7 to 9.

1. *Aid Appropriation.—Complaint to Enjoin Tax.—Objections.—Separate Clauses.—Demurrer.*—In a suit to enjoin the collection of a township tax levied for an appropriation to a railroad company to aid in the construction of its road, it is good pleading to state in a single paragraph of complaint all the facts leading to and resulting in the levy of the tax, and then to set forth, in the same paragraph but in separately numbered clauses or specifications, each several ground of objection to the validity of the tax, and the sufficiency of each clause or specification may be tested by a demurrer for the want of facts.
Scott v. *Hansheer*, 1

2. *Same.—Sufficiency of Petition.—Ambiguity or Uncertainty.*—Mere ambiguity or uncertainty in the phraseology of the petition for an appropriation will not vitiate or avoid the levy of the tax, when it is apparent that no interested party was or could be misled or deceived thereby, or could misapprehend the intention and purpose of the petitioners. *Ib.*

3. *Same.—Incorporated City Within Township Limits.—Part of Township.—City Voters are Township Voters.—City and Township Taxables.*—For the purpose of a township tax in aid of a railroad, an incorporated city within the limits of a civil township is a part of such township, the qualified voters of the city are voters of the township, and the taxable property within the city is also taxable property within the township and is subject to taxation for township purposes. *Ib.*

4. *Same.—Consolidated Company.*—Where an appropriation has been lawfully made by a township to a railroad company to aid in the construction of its road, the company acquires such a right to and interest in the appropriation, and the obligation of the township to pay the same, as, upon its subsequent consolidation with another railroad corporation, will pass to and vest in the consolidated company. *Ib.*

5. *Pleading.—Negligence.—Personal Injury.*—In a suit against a railroad company by a passenger for personal injury, a complaint which alleges that the injury was the result of an act of the company's servant performed in a "*wilful*, reckless, careless and unlawful manner," and fails to aver that there was no contributory negligence by the plaintiff, is good on demurrer. *Indiana, etc., R. W. Co.* v. *Burdge*, 46

6. *Same.—Wilful Injury.—Evidence.*—In such case, if there be no evidence tending to prove that the injury was wilful, the plaintiff can not recover. *Ib.*

7. *Killing Stock.—Fencing.—Burden of Proof.*—In a suit against a railroad company for killing an animal, on account of the want of a sufficient fence, if the company relies upon the fact that its road could not be fenced at the place in question, it has the burden of proof as to that matter. *Louisville, etc., R. W. Co.* v. *Clark*, 111

8. *Right of Way.—Deed.—Condition.—Failure to Build.—Mortgage.—Subsequent Condemnation.*—A deed to a railroad company recited that, "in consideration of the location and construction of" its railway, right of way was granted "so long as it shall be required for the uses of said" company. The latter mortgaged the right of way; the railroad was never constructed, and, upon foreclosure, the mortgaged premises were sold to T., who conveyed to I. Subsequently, another company condemned the right of way and paid the money into court, when suit was brought by I. against the administrator of the estate of the grantor, to recover the money so paid into court.
Held, that the administrator is, and I. is not, entitled to recover.
Ingalls v. *Byers*, 134

9. *Killing Stock.—Fences.—Cattle-Guards.*—An instruction, that if an animal enter upon the track of a railroad from a highway by reason of insufficient cattle-guards, the company is by statute made liable for injury to the animal received from the locomotives or cars, is not objectionable. *Whitewater R. R. Co.* v. *Bridgett, 216*

10. *Killing Stock of Employee.—Negligence.—Fencing.*—To a complaint under the statute for killing the plaintiff's mare, the road not being fenced, etc., it was answered: 1. That the plaintiff was the defendant's servant; that as such it was his duty to keep the railroad track, near a certain station, free from trespassing animals; that, in violation of such duty, he turned his mare out at such a place, near which the track was not fenced, whereby, etc. 2. That a certain station was a public place, with side-tracks and switches where large shipments of goods were made and received, and that plaintiff turned his mare loose in that immediate vicinity, and she went upon the track at a place where it was not securely fenced, etc.

Held, that both paragraphs were bad on demurrer; the first, for not averring that at the place where the animal entered upon the track and was killed, the employee was required by contract to keep off trespassing animals, and the second, for failure to show that the animal was killed at the station, where no fence was required.
Louisville, etc., R. W. Co. v. *Skelton, 222*

11. *Killing Stock.—Fencing.—Complaint.—Demurrer.*—In an action against a railroad company to recover the value of two horses belonging to the plaintiff, alleged to have been killed by the defendant's locomotive and train of cars, where the complaint charged, *inter alia*, "that the railroad of the defendant was not fenced at the place where said horses got on the track and where said horses were killed," the allegation as to the want of fences is sufficiently definite and certain on a demurrer to the complaint for the want of facts.
Louisville, etc., R. W. Co. v. *Harrigan, 245*

12. *Negligence.—Injury to Drunken Passenger.—Notice of Condition and Whereabouts.*—A drunken passenger upon a railway train was, owing solely to his condition, carried past his destination, and then, failing to comprehend his liability to pay further fare or to get off the train, he was removed lawfully from the train by the conductor and assistants, and placed a short distance from the track. Subsequently he wandered upon the track, where he was run over and killed by another train at a point where those in charge of the latter train did not and could not see him in time to prevent the accident.

Held, that the railway company was not liable for his death, and was not chargeable with notice of his condition or whereabouts.
McClelland v. *Louisville, etc., R. W. Co., 276*

13. *Common Carrier.—Pleading.—Variance.—Practice.*—Where a complaint against a common carrier of goods, for failure to deliver goods promptly, counts upon a mere common law liability, and the evidence shows that the goods were received under a special written contract, the variance is fatal, and in such case the overruling of a demurrer to an answer is a harmless error. *Bartlett* v. *Pittsburgh, etc., R. W. Co., 281*

14. *Same.—Negligence.—Special Contract.*—The common law liability of a common carrier may be limited by special contract, except such as results from the carrier's negligence. *Ib.*

15. *Same.—Liability for Delay in Shipment.—Riots.*—Suit by a shipper against a railroad company, on a special contract for the shipment of live hogs, whereby the shipper in terms assumed the risk of delay in transportation. It was alleged in the complaint that before entering into the contract riots existed, hindering the movement of freight, of the extent of which the shipper, being ignorant, applied to the agent of

the defendant at L. to learn if the defendant would ship live hogs thence to East Liberty, notwithstanding the riots; that the defendant, knowing the extent of the riots, by its agent, handed to the plaintiff a copy of a general order of the defendant, authorizing its agents to receive and forward such property, whereupon the special contract was entered into and the hogs shipped for East Liberty under it; that upon reaching Columbus, Ohio, they were stopped by reason of riots, and delayed ten days, unloaded, kept in unhealthy pens, whereby they died, lost weight, etc. Another paragraph differed only in averring that the defendant's employees abandoned the train and were engaged in the riot in consequence of a reduction of their wages. Another was also similar save that it was silent as to the general order to receive and ship such property and as to the riots, averring a failure to deliver the hogs at East Liberty within a reasonable time; that there was ten days' delay at Columbus, whereby, etc. Answer: 1. That on arrival at Columbus there was a riot at East Liberty beyond the power of the authorities to suppress, destroying the defendant's railroad, depots and cars, making it impossible safely to take the hogs to East Liberty; that the delay at Columbus was necessary during the riot; that the defendant's servants were not engaged in the riot; that the hogs were properly unloaded and cared for at Columbus; that they died from disease contracted before delivery for shipment; and that there was no riot when they were received for shipment. 2. That by reason of riot, not by defendant's employees, it was unsafe at the time to carry beyond Columbus; that within twenty-four hours after the riot ceased the hogs were delivered at East Liberty; that at Columbus they were unloaded and cared for by the plaintiff; that those which died were diseased when shipped. 3. Same as the second, with the averment that there was no negligence of the defendant.

Held, that each paragraph of the answer was good, showing that the delay was not caused by any negligence of the defendant. *Ib.*

16. *Killing Stock.—Fence.—Complaint.*—In a complaint against a railway company, for killing stock, it is sufficient to allege, on that point, that the place where the stock entered upon the track "was not fenced."
Louisville, etc., R. W. Co. v. *Shanklin*, 297

17. *Same.—Time.—Demurrer.—Motion to Make Certain.*—A want of certainty as to time, in such complaint, is reached by motion to make specific, and not by demurrer. *Ib.*

18. *Same.—Highway Crossing.—Abandoned Highway.—Instruction.*—Where, in such action, the defendant answers that it could not fence at the point where the stock entered on its track, because of a public highway crossing there, and there was evidence tending to show a previous abandonment of such highway, it was proper for the court to instruct the jury that if, at such point, such highway had been abandoned for over thirty years, it would be the same as though it had never existed. *Ib.*

19. *Same.—Burden of Proof.*—As to instructions concerning the burden of proof upon each party, and as to the company's duty to fence, see opinion. *Ib.*

20. *Same.—Company's Duty to Fence.*—If there be room to erect a fence between a railroad and an adjoining parallel highway, the railroad company is lawfully bound to fence. *Ib.*

21. *Killing Stock.—Fencing.—Burden of Proof.*—The liability of railroad companies for cattle killed, created by statute for failure to fence, depends upon whether they are bound to fence at the place where the cattle enter upon the track. The *onus* of proving that there was no sufficient fence at that place is on the plaintiff, and then the defendant must show a sufficient excuse therefor.
Lake Erie, etc., R. W. Co. v. *Kneadle*, 454

22. *Same.*—A railroad company is not bound to place fences or cattle-guards where they would interfere with the transaction of its business or endanger its servants. *Ib.*

23. *Evidence.—Damages.—Tort.*—In an action sounding in tort, by a passenger against a railroad company, for carrying her beyond her place of destination, there being evidence of failure to stop the train at the place, that she was landed where no conveyance could be procured, and that she then walked, in the night, a distance of five miles, she was not allowed to prove further that the walk occupied three hours over dusty roads, that in crossing a creek she got her clothing and feet wet, that she was chased by dogs, and otherwise frightened, and that the weather was hot and sultry, in consequence of which she became and remained sick for some time.

Held, that the evidence was admissible.

Cincinnati, etc., R. R. Co. v. *Eaton*, 474

24. *Same.*—For a discussion as to what may be considered in assessing damages in such cases, see opinion. *Ib.*

25. *Quo Warranto.—Information against Incorporators of Railway Company.—Contradictory Averments.—Pleading.*—Where an information, in the nature of a *quo warranto*, against the incorporators of a railroad company, sets out several alleged illegal acts in the same paragraph, these several acts must be construed, not as separate paragraphs, but as parts of one paragraph; and if the allegations contradict each other as to material facts, the paragraph is bad. *State, ex rel.*, v. *Foulkes*, 493

26. *Same.—Illegal Act of Secretary of State.*—The fact that the Secretary of State, in filing the articles of such company, unlawfully antedates them, is not ground for such information. *Ib.*

27. *Same.—Filing Articles of Association.*—In filing such articles, it is the act of depositing them in such secretary's office, and not the mere file-mark thereon, that constitutes the filing. *Ib.*

28. *Same.—Residences of Subscribers.*—Such articles need not state the residences of the subscribers. *Ib.*

29. *Fences.*—The fact that adjoining land-owners may have erected fences along a railroad does not relieve the company from the duty of keeping its track securely fenced. *Louisville, etc., R. W. Co.* v. *White*, 257

RAPE.

See CRIMINAL LAW, 1, 2.

REAL ESTATE.

See CORPORATION; DECEDENTS' ESTATES, 1 to 3, 5, 8; DEED; DESCENTS; ESTOPPEL; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; INSANITY; JUDGMENT, 1; MARRIED WOMAN, 1 to 9; MORTGAGE; NEW TRIAL, 1, 2; PARTITION; QUIETING TITLE; RAILROAD, 8; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE; SPECIFIC PERFORMANCE; TAXES; TENANTS IN COMMON; TRUST AND TRUSTEE; WILL, 1 to 4.

REAL ESTATE, ACTION TO RECOVER.

See EVIDENCE, 7; NEW TRIAL, 1, 2; PARTITION; TAXES, 3.

1. *Recovery of Possession.—Complaint.*—In an action to recover the possession of real estate, the complaint must show, under the provisions of section 1054, R. S. 1881, that the defendant unlawfully keeps the plaintiff out of possession, or it will be held bad on demurrer.

Second Nat'l Bank v. *Corey*, 457

2. *Same.—Action to Quiet Title.*—Under the provisions of section 1070, R. S. 1881, in an action to quiet the title to real estate, the complaint

must show that the defendant's claim is adverse to the title asserted by the plaintiff, or is unfounded and a cloud upon the plaintiff's title; otherwise the defendant's demurrer thereto must be sustained. *Ib.*

3. *Same.—Sheriff's Sale and Deed.—Defective and Void Description.—Possession.—Defence.—Statute of Limitations.*—Where real estate is sold by the sheriff by a defective and void description thereof, in the levy of the execution, advertisement, sale and conveyance of the land, and possession follows such sale and conveyance, the ten years' limitation provided in the *third* clause of section 293, R. S. 1881, will constitute a complete and effective defence to any action brought for the recovery of such real estate by the execution debtor, or by any person claiming under him, by title acquired after the date of the judgment. *Ib.*

RECORD.

See BILL OF EXCEPTIONS; CONTRACT, 2; INSTRUCTIONS TO JURY, 5; INTERROGATORIES TO JURY, 1; MASTER COMMISSIONER, 1, 3; NEW TRIAL, 5; PRACTICE, 19; SUPREME COURT.

REDEMPTION.

See MORTGAGE, 1; PARTITION.

RELEASE OF SURETY.

See MORTGAGE, 2; OFFICIAL BOND, 1, 2; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 2; REPLEVIN BAIL.

RENTS.

See DECEDENTS' ESTATES, 5; LANDLORD AND TENANT.

REPAIRS.

See PARTNERSHIP.

REPEAL OF STATUTE.

See MARRIED WOMAN, 8.

REPLEVIN.

1. *Judgment on Dismissal.—Possession.*—A replevin suit before a justice was dismissed for want of a sufficient bond, and a judgment of return rendered, the plaintiff having had the property delivered to him by virtue of the writ. Without first restoring the property the plaintiff began another suit.

Held, that when the second suit was begun the property was constructively in the defendant's possession. *Teeple* v. *Dickey*, 124

2. *Parties.—Verdict.—Judgment.*—In a joint suit in replevin, there may be a verdict and judgment for one plaintiff and against the others. R. S. 1881, section 568. *Hamilton* v. *Browning*, 242

3. *Same.—Demand.*—Where the property has been wrongfully taken by the defendant from the plaintiff's possession, no demand is necessary to maintain replevin. *Ib.*

REPLEVIN BAIL.

Fraud.—Principal and Surety.—Judgment was obtained against a principal and three sureties, and execution thereon stayed by replevin bail. Afterwards one of the original sureties was released by the judgment plaintiff in consideration that J. would become additional replevin bail, which he did upon the false assurance of the principal debtor that the other original sureties consented thereto, which in truth they did not, and they afterwards procured a decree releasing them from the judgment.

Held, that J. was bound as replevin bail, the creditor having no knowledge of the fraud. *Jones* v. *Swift*, 516

RES ADJUDICATA.

See FORMER ADJUDICATION; TOWN TREASURER, 1.

RES GESTÆ.

See NEGLIGENCE, 1.

RESIDENT.

See EVIDENCE, 8; RAILROAD, 28; TRUST AND TRUSTEE.

RIGHT OF WAY.

See RAILROAD, 8.

RIOTS.

See RAILROAD, 15.

SALE.

See CITY, 1 to 3; CONTRACT, 3; CORPORATION; CRIMINAL LAW, 14; DECEDENTS' ESTATES, 1 to 3, 8; FRAUD, 2; INTOXICATING LIQUOR; SHERIFF'S SALE.

1. *Contract.—Breach of Warranty.—Notice.*—In an action to recover the agreed price of a self-binding reaper, the defence was a breach of a written warranty wherein it was stipulated that "if, upon one day's trial, the machine should not work well," the purchaser should give immediate notice to the seller, or its agent, and allow time to put it in order, and, if it could not thus be made to work well, the purchaser should return it at once to the agent. It was alleged, in the answer, that, upon the first day's trial, the machine broke and became useless, in the presence of the seller's agent, who then promised and agreed to return on a certain day, and repair the machine and put it in good condition, which he did not do, and that the purchaser then offered to return the machine, but the agent refused to receive it.

Held, that the answer stated a good defence to the action, and that the seller could not recover the price of the machine.
McCormick, etc., Co. v. *Embree, 85*

2. *Personal Property.—Cash on Delivery.—Conditional Sale.*—Where personal property is sold for cash on delivery, the sale is conditional, and the title to the property will not vest in the purchaser until the terms of the sale are complied with. *Lanman* v. *McGregor, 301*

3. *Same.—Sale by Conditional Vendee to Third Party. Liability of Such Purchaser.*—Where, in such case, the conditional vendee of personal property, without the knowledge or consent of the vendor, and without compliance with the terms of sale, re-sells such property to a third party, who converts the same to his own use, such third party acquires no title to the property as against the original vendor, and is liable to him for its value, or for the balance due him from his vendee on the agreed price. *Ib.*

SECRETARY OF STATE.

See RAILROAD, 26, 27.

SEDUCTION.

See CRIMINAL CONVERSATION.

SHERIFF'S SALE.

See CORPORATION; DESCENTS, 2; FRAUDULENT CONVEYANCE, 6; JUDGMENT, 1; MARRIED WOMAN, 5; MORTGAGE, 1; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER, 3.

Real Estate.—Execution.—Inadequacy of Price.—Setting Aside Sale.—A sheriff's sale on execution of real estate of the alleged value of $6,400, subject to a mortgage of $4,000, for the sum of $5, will not be set aside merely on the ground of inadequacy of price. *Kerr* v. *Haverstick, 178*

SPECIAL FINDING.

See ATTACHMENT AND GARNISHMENT, 4; NEW TRIAL, 8; WILL, 5.

1. *Special Finding.*—Upon a special finding of facts by the court, a party may move, as in case of a special verdict, to make more specific, to strike out a part, or for a finding of facts omitted. *Knox* v. *Trafulet*, 346

2. *Same.—Motion to Make Special Findings Specific.*—A fact found not within the issues is surplusage, and a motion to make it more specific should be refused; and a finding that the defendant had the right, as stated in the third paragraph of his answer, is as certain as if the averments of the answer were repeated. *Ib.*

3. *Same.—Venire De Novo.*—Where a special finding states facts sufficient to justify the judgment, a *venire de novo* is properly refused. *Ib.*

SPECIFIC PERFORMANCE.

1. *Complaint.—Agreement.—Statute of Frauds.*—A complaint for the specific performance of a parol contract to convey land is good without averring an agreement to convey, if it allege facts from which the law will imply such an agreement, and also facts which take the case out of the statute of frauds. *Drum* v. *Stevens*, 181

2. *Same.—Possession.*—Where a parol contract for the conveyance of lands is taken out of the statute of frauds by the delivery of possession to the vendee and the making of improvements, the right to specific performance is not lost by a temporary cessation of actual possession under circumstances which, however, indicate an intention not to surrender the right. *Ib.*

3. *Same.—Husband and Wife.—Contract.—Evidence.*—The rights of a married woman acquired by contract can not be affected by another contract made by the husband not in her presence, nor shown to be by her authority, and evidence thereof is not admissible. *Ib.*

4. *Effect of Decree for Divorce.—Alimony.—Presumption of Adjudication.*—A husband, having made the first payment for, entered into possession of, and made valuable improvements on, certain real estate, which was to be conveyed to him upon full payment therefor, made a second payment thereon with money furnished him by his wife for that purpose, and then suffered the residue to default for several years, when his wife made full payment and took title in her own name, with his knowledge, and then, upon her petition for divorce and alimony, she procured a decree of divorce, without alimony, against him, he answering only by general denial, and no evidence as to alimony having been given; afterwards he instituted an action against her and the grantor for specific performance, he having tendered to the grantor less than the amount due.

Held, as a conclusion of law, upon the foregoing facts, that in equity he ought not to maintain such action. *Hills* v. *Hills*, 436

STATUTE CONSTRUED.

See CLERK OF CIRCUIT COURT, 4; CORPORATION, 3; EXECUTION, 2; DESCENTS, 2; JUDGMENT, 2; MARRIED WOMAN, 6, 7 to 10; NEW TRIAL, 10; PROMISSORY NOTE, 1; TAXES, 2.

STATUTE OF FRAUDS.

See SPECIFIC PERFORMANCE, 1 to 3.

STATUTE OF LIMITATIONS.

See CONTRACT, 1, 2; FRAUDULENT CONVEYANCE, 7, 8; REAL ESTATE, ACTION TO RECOVER, 3; TAXES, 3.

1. *Demurrer.—Pleading.—Practice.*—The statute of limitations is not avail-

able on demurrer to a complaint, unless it directly appears by the complaint that the case is not within any of the exceptions to the statute. *Hogan* v. *Robinson*, *138*

2. *Defences to Actions.*—Pure defences are not barred by the statute of limitations. *Robinson* v. *Glass*, *211*

STREET.

See CITY, 5; CRIMINAL LAW, 15; NUISANCE.

SUBROGATION.

See PARTNERSHIP.

SUMMONS.

See JUDGMENT, 2.

SUPERIOR COURT.

Assignment of Errors on Appeal from Marion Superior Court.—On appeal from the Marion Superior Court, error can not be well assigned upon the rulings at special term. *Heshion* v. *Scott*, *570*

SUPERVISOR.

See HIGHWAY, 7.

SUPREME COURT.

See ATTACHMENT AND GARNISHMENT, 2; BILL OF EXCEPTIONS; CRIMINAL LAW, 2, 13, 16; DECEDENTS' ESTATES, 4; EXECUTION, 3; HIGHWAY, 9; INSTRUCTIONS TO JURY, 5; INTERROGATORIES TO JURY; MASTER COMMISSIONER, 1 to 3; NUISANCE; NEW TRIAL, 5, 6, 8, 9; PLEADING, 8; PRACTICE, 1, 2, 4 to 8, 19, 20, 22.

1. *Objections to Evidence.—Supreme Court.*—Objections to evidence not stated to the court below will not be considered by the Supreme Court. *Lake Erie, etc., R. W. Co.* v. *Parker*, *91*

2. *Same.*—An objection below to evidence, that it is "irrelevant, incompetent and immaterial," will not warrant the Supreme Court in considering whether or not it expressed merely the inadmissible opinion of the witness. *Ib.*

3. *Same.—Motion for New Trial.*—A ruling admitting evidence, unless stated as a cause for a new trial, can not be questioned in the Supreme Court. *Ib.*

4. The Supreme Court will not consider the action of the court below in refusing to tax the fees of certain witnesses of the appellee to him, where the record does not show that fees were claimed by such witnesses or taxed at all. *Teeple* v. *Dickey*, *124*

5. *Weight of Evidence.*—A verdict will not be disturbed by the Supreme Court on the weight of the evidence. *Johnston, etc., Co.* v. *Bartley*, *131*
Piersol v. *Hudson*, *318*

6. *Instructions.*—Where the evidence is not in the record, an instruction will be upheld by the Supreme Court, if in any conceivable state of evidence under the issues it might have been proper. *Conden* v. *Morningstar*, *150*

7. *Same.—Exceptions.*—Exceptions to instructions must be taken either in the mode prescribed by section 535, R. S. 1881, or by bill of exceptions; and, if not so reserved, no question thereon can be made in the Supreme Court. *Ib.*

8. *Same.—Evidence.*—The refusal to admit evidence will not be held to be error if the evidence could only have been proper upon the introduction of some other evidence, and none of the evidence is in the record. For illustration see opinion. *Ib.*

9. *Motion for New Trial.*—A motion for a new trial, assigning for cause that the court "admitted improper evidence" and excluded "competent evidence, as shown by bill of exceptions No. 2, now exhibited to the court," is too indefinite to present any question where the bill of exceptions is not filed until afterwards. *Arbuckle* v. *Biederman*, *168*

10. *Brief.—Waiver.*—A brief which merely states a question, but fails to so discuss it as to show any reason for questioning the action of the court below, is a waiver of the question. *Ib.*

11. *Answer to Assignment of Errors.—Defective Certificate.*—It is no answer to an assignment of errors to allege that the clerk's certificate is not dated with certainty. *Conaway* v. *Ascherman*, *187*

12. *Same.—Appeal.—Notice.—Co-party refusing to Join.*—Where an appeal is taken during term time, and an appeal bond and the transcript are filed within the time fixed by the trial court, by some only of the parties to the judgment, the other parties may be made co-parties to the appeal without notice by joining them as appellees in the assignment of errors. *Ib.*

13. *Same.—County Commissioners.—Highway.*—Where, in a highway case appealed to the circuit court, the county commissioners are ordered to pay a certain part of damages assessed in favor of a land-owner, that fact does not make such board a proper party to an appeal to the Supreme Court. *Ib.*

14. *Evidence.—Conflict.—Erroneous Instructions.*—The fact that a verdict seems to be strongly sustained by the evidence will not prevent a reversal for erroneous instructions, if there be a conflict of evidence. *Robinson* v. *Glass*, *211*

15. *Harmless Error.—Instructions.—Special Interrogatories.*—Where it appears by the answers of the jury to special interrogatories, that an erroneous instruction did not influence the verdict, the error is not available. *Whitewater R. R. Co.* v. *Bridgett*, *216*

16. *Complaint of Two Paragraphs.—Demurrer to Complaint.—Ruling as Error.—Waiver of Error as to One Paragraph.*—A demurrer to a complaint of two or more paragraphs, as an entirety, if either one is good, should be overruled. If such demurrer is overruled, and such ruling is the only error assigned, and, pending the appeal, the defendant files a written waiver of any and all errors as to the overruling of the demurrer, and the judgment below, as to one paragraph of the complaint, the record will show no error in overruling the demurrer to the other paragraph or paragraphs of the complaint, and the Supreme Court must affirm the judgment. *Millikan* v. *Temple*, *261*

17. *Harmless Error.*—Where it appears by the record that a pleading was found to be untrue, the Supreme Court will not consider whether there was error in overruling a demurrer to it. *Bartlett* v. *Pittsburgh, etc., R. W. Co.*, *281*

18. *Judgment on Facts Found, Notwithstanding General Verdict.*—Unless there be a motion below for judgment on the jury's answers to interrogatories, notwithstanding the general verdict, no question concerning the right to such judgment can arise in the Supreme Court. *Ib.*

19. *Harmless Error.—Evidence.*—The rejection of admissible evidence, which it is clear would not have changed the result, is a harmless error. *Ib.*

20. *Complaint.—Demurrer.*—A complaint prayed for relief, either the rescission of a contract or damages for deceit, and there was judgment for damages only. The overruling of a demurrer to the complaint was assigned for error, but the argument questioned only its sufficiency for rescission. The Supreme Court refused to consider that question. *Mills* v. *Winter*, *329*

21. *Same.—Bill of Exceptions.—Evidence.— Witnesses.*—Where a bill of exceptions shows that the party offered, but was not permitted, to prove a certain fact by several witnesses named, the fact being proper evidence, but does not show that the witnesses were produced, no error is shown. *Ib.*

22. *Conflicting Evidence.—Finding.*—Where the evidence is conflicting, the Supreme Court will not disturb the finding of the trial court, nor reverse its judgment, upon such evidence. *Terre Haute, etc., R. R. Co.* v. *Flanigan, 336*

23. *Bill of Exceptions.*—A proper bill of exceptions, filed in vacation according to leave granted at the time of trial, will put in the record rulings made during the trial. *Knox* v. *Trafalet, 346*

24. *Same.—Conclusions of Law.—Error.*—Error in conclusions of law in favor of the objecting party is not available. *Ib.*

25. *Assignment of Error.*—One of two co-parties may alone assign error after notice of his appeal, a joinder in error and a written agreement of submission filed by the parties. *Cain* v. *Goda, 555*

26. *Harmless Error.*—The Supreme Court will not reverse a judgment on account of the admission of immaterial evidence. *Ib.* *Mills* v. *Winter, 329*

27. *Waiver.*—In criminal, as in civil causes, errors assigned by the appellant, which are not discussed in his brief, are regarded as waived, and are not considered by the Supreme Court. *Bybee* v. *State, 443*

28. *Appeal.—To Stay Proceedings Bond must be Filed.—Mandate Against Clerk.*—Where an appeal to the Supreme Court is taken, during term time, from a judgment for costs, and time is granted for the filing of an appeal bond, execution will not be stayed until such bond is filed; and, if such bond be not filed, the clerk of the court below may be compelled, by mandate, to issue such execution, though the time for filing such bond has not yet expired. *Mitchell* v. *Gregory, 363*

29. *Parties.*—It is only parties affected by the judgment who are required by statute to be made parties to an appeal to the Supreme Court. *Hogan* v. *Robinson, 138*

30. *Pleading.—Complaint.*—Where the only objections to the sufficiency of a complaint are, that it states, in one paragraph, several items of indebtedness on different accounts, and fails to aver that either or all of them are due and unpaid, and that the bill of particulars therewith filed fails to show that the items therein were between the parties to the suit, such objections come too late and afford no ground for the reversal of the judgment, when presented for the first time, after verdict and judgment, by an assignment of error in the Supreme Court that the complaint does not state facts sufficient to constitue a cause of action. *Hartlep* v. *Cole, 513*

31. *Practice.—Harmless Error.*—Where the answer to an improper question is harmless, there is no available error. *Brown* v. *Owen, 31*

32. *Same.—Immaterial Evidence.*—Where the answer to a question asked could not, of itself, be material, and there is no offer to prove other facts which would make such answer material, the sustaining of an objection to such question is not erroneous. *Ib.*

33. *Same.—Immaterial Evidence.*—The admission of evidence which, though immaterial, is harmless, is not available error. *Ib.*

34. *Practice.—Pleading.*—The overruling of a motion to strike out part of a pleading does not constitute an available error. *Losey* v. *Bond, 67*

35. *Same.—Judgment.*—An error in sustaining a demurrer to an answer in bar of a personal judgment is not an available error, where no such judgment is rendered. *Ib*

36. *Practice.—Evidence.*—The record on appeal must show that objection or exception was taken to the introduction of the evidence complained of, to present the question, in the Supreme Court, of its admissibility. *Bush* v. *Banta*, 509

37. *Practice.—Verdict.—Instructions.—Harmless Error.*—Where, upon the material and undisputed facts in the case, the verdict could not have been otherwise, the court will not inquire whether a challenge to a juror was improperly overruled, nor whether instructions were erroneously given or refused, as, in such case, such errors would not reverse the judgment. *Morris* v. *State, ex rel.*, 565

38. *Practice.*—Where the judgment gives proper relief, and in addition thereto other relief not proper, but no objection has been made to the judgment and no motion to modify it, the Supreme Court will not reverse. *Earle* v. *Simons*, 573

39. *New Trial.—Evidence.*—Where the only question presented by the alleged error of the circuit court, in overruling the motion for a new trial, is the sufficiency of the evidence to sustain the finding of guilty, and the evidence is conflicting, the finding will not be disturbed, or the judgment reversed, by the Supreme Court. *Mathis* v. *State*, 562

40. *Harmless Error.*—Where at the trial a pleading is found not to be true, the error, if any, in overruling a demurrer to it is harmless. *Louisville, etc., R. W. Co.* v. *Davis*, 601

SURPRISE.

See BASTARDY.

TAXES.

See NEW TRIAL, 1; RAILROAD, 1 to 4.

1. *Tax Title.—Evidence.—Deed.—Description.—Decedents' Estates.—Tender.—Warranty Deed.—Estoppel.*—Petition by an administrator to sell lands, and to quiet the title thereto against a tax title.

Held, that in such case it was not necessary to tender the money paid by the purchaser in discharge of the taxes.

Held, also, that the description "West part of the N. E. N. E., section 35, town. 23 N., R. 6 E., 30 acres," was good.

Held, also, that a defendant holding a tax title, *prima facie* good, need not show anything as to the levy of the taxes, or the meeting of the board of equalization.

Held, also, that a failure by the county auditor properly to transfer lands for taxation, or to charge them on the duplicate to the proper owner, or that some of the taxes accrued during a former ownership, are not objections to the validity of a tax title.

Held, also, that a sale of lands for taxes is invalid, if there be personal property liable to be seized therefor.

Held, also, that one who conveys lands with general warranty is estopped from claiming title by virtue of a tax sale, if any part of the taxes for which it was sold were upon it at the time of his conveyance. *Hannah* v. *Collins*, 201

2. *Tax Title.—Personal Property.—Burden of Proof.—Statute Construed.*—One who asserts title by virtue of a sale of lands for taxes is required, under the revenue act of 1872, to prove that the owner of the land had no personal property out of which the taxes might have been made. Sections 222, 224, 254 and 255 do not relieve him of this burden. *Earle* v. *Simons*, 573

3. *Same.—Statute of Limitations.*—The limitation of five years, fixed by section 250, applies only to suits to recover possession, and not to those to quiet title. *Ib.*

TENANTS IN COMMON.

See PARTITION.

Judicial Sale.—Right of Tenant in Common to Purchase.—A tenant in common has a right to purchase at a judicial sale his co-tenant's interest in the joint property. *Elston v. Piggott, 14*

TENDER.

See CONTRACT, 3; TAXES, 1.

TIME.

See CRIMINAL CONVERSATION, 1, 2; JUDGMENT, 2; RAILROAD, 17.

TITLE.

See CORPORATION; DECEDENTS' ESTATES, 3; JUDGMENT, 1; PARTITION; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER; SALE, 2, 3; TAXES; WILL.

TORT.

See CRIMINAL CONVERSATION, 1 to 3; FALSE IMPRISONMENT; HIGHWAY, 7; LANDLORD AND TENANT, 2, 3; RAILROAD, 5, 12, 23.

TOWN TREASURER.

1. *Suit on Bond.—Judgment.—Pleading.—Res Adjudicata.*—In a suit upon the bond of a town treasurer for failure to pay the moneys of the town to his successor, an answer in bar that third parties had recovered a judgment against the town upon bonds issued by the town is bad. *Harvey v. State, ex rel., 159*

2. *Same.—Breach.*—The use by a town treasurer of the funds of the town is not a breach of the condition of his bond; there is no breach until he fails to pay or account as the law requires. *Ib.*

TOWNSHIP.

See RAILROAD, 3, 4.

TRANSCRIPT.

See BILL OF EXCEPTIONS, 2, 3.

TRESPASS.

See CRIMINAL CONVERSATION, 1 to 3; FALSE IMPRISONMENT; HIGHWAY, 7; LANDLORD AND TENANT, 2, 3.

TRIAL.

See ATTACHMENT AND GARNISHMENT, 2; PRACTICE, 23; WILL, 5.

TRUST AND TRUSTEE.

Non-Resident.—Statute Construed.—The statute, R. S. 1881, section 2988, has no application to a trust in lands arising by operation of law. *Meikel v. Greene, 344*

VARIANCE.

See RAILROAD, 13.

VENDOR AND VENDEE.

See DECEDENTS' ESTATES, 8; FRAUD, 2; FRAUDULENT CONVEYANCE; PROMISSORY NOTE, 6; SALE; SPECIFIC PERFORMANCE.

VENIRE DE NOVO.

See SPECIAL FINDING.

VERDICT.

See INTERROGATORIES TO JURY, 2; NEW TRIAL, 8; PLEADING, 8; PRACTICE, 14, 20; REPLEVIN, 2; SUPREME COURT, 14, 15, 18, 37.

Practice.—Verdict and Special Answers.—A motion for judgment in his favor, upon the general verdict and answers to interrogatories, made by the party against the general verdict, should be overruled.
North-Western, etc., Ins. Co. v. *Blankenship*, 535

VOTER.

See RAILROAD, 3.

WAGER.

See INSURANCE.

WAIVER.

See CRIMINAL LAW, 16; PRACTICE, 9, 15; SUPREME COURT, 10, 16, 20, 27.

WARRANTY.

See SALE, 1.

WAY.

See CRIMINAL LAW, 15; HIGHWAY.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 5, 22, 39.

WIDOW.

See DECEDENTS' ESTATES, 2, 3, 5, 6, 8 to 10; DESCENTS, 2.

WILL.

See DESCENTS, 1.

1. *Contest of.—Instructions.—Evidence.—Admission of Legatee.*—Suit to contest a will on the ground that the testator was of unsound mind.
Held, that evidence that the testator had expressed the opinion that some of his children contestants had mistreated him, stating no fact, and an opinion expressed by such children, as witnesses, that they had not mistreated him, was too intangible to justify an instruction that if the testator was influenced in framing his will by such belief, and that it was a delusion, the fact would justify a verdict for the contestants.
Held, also, that an admission by one of several contestees that the testator was of unsound mind was not admissible in evidence.
Held, also, that evidence that a tract of land devised to one of the contestees was purchased with money of the testator's first wife, and the title taken by mistake in his own name, was not admissible.
Shorb v. *Brubaker*, 165

2. *Rule for Construction.—Testator's Intention.*—The intention of the testator is to be ascertained, in construing the provisions of his will, and, if possible, carried into effect. This is the primary rule in the interpretation of a will, and, for the purpose of ascertaining the testator's intention, all the provisions of the will relating to the subject of the inquiry should be construed together. *Downie* v. *Buennagel*, 228

3. *Same.—Devise of Life-Estate.—Power to Sell and Convey in Fee.—Execution of Power.—Warranty Deed.—Consideration.*—By his last will and testament, which was duly admitted to probate, A. G. S. gave and devised all his estate, real and personal, to his mother, M. E. D., "to hold and enjoy the same during her life, with full power to sell the same, or any part thereof, and appropriate the proceeds to her own use and benefit; and all deeds and conveyances of real estate, by her made, shall pass a title in fee to the purchaser, it being my will that she shall enjoy the same as though it were devised to her in fee." In the second item of his will, the testator further said: "After the death of my mother, I devise all of the said estate to my half brother, Charles Lindley

Downie." Afterwards, on November 18th, 1874, the testator's mother, M. E. D., by her deed of that date, sold, conveyed and warranted a part of the real estate so devised to her to the defendant C. B., who paid her therefor the full consideration and value of the fee simple thereof, and accepted her deed as conveying to and vesting in him the fee of the real estate described therein, and took and held possession thereof, making valuable and lasting improvement thereon. Upon the foregoing facts,

Held, that in the execution of such warranty deed as aforesaid, the devisee, M. E. D., manifestly intended to execute the power of disposition conferred on her by the testator's will, and that, by such deed, she conveyed to the defendant C. B., not merely her life-estate in the real estate, described in the deed, but also the absolute title in fee simple in and to such real estate, which she had "full power" to do, under the will. *Ib.*

4. *Same.—Declaratory Deed.—Evidence.—Practice.*—On the trial, the court admitted in evidence, over the plaintiff's objections, a deed executed by the devisee, M. E. D., on September 25th, 1875, wherein she declared, among other things, that it was her purpose and intention, in the execution of her previous deed to the defendant C. B., to convey to him the real estate therein described in fee simple, in execution of the power conferred on her by the testator's will.

Held, that there was no error in the admission of such deed in evidence. *Ib.*

5. *Resisting Probate.—Calling Jury as to Questions of Fact.—Chancery Practice.—Special Findings.*—Where, in an action resisting the probate of a will, the court, of its own motion and without objection, calls a jury and submits to them material questions of fact without requiring them to find a general verdict, the answers of the jury are not binding upon the court, but are, as in chancery practice, simply advisory, and the court may make its own finding upon the evidence, contrary to such answers. *Hite* v. *Sims*, *333*

6. *Same.—Fraud.—Unsoundness of Mind.—Delusion.*—Where, in such action, resisting the probate of a will because of alleged unsoundness of the testator's mind, and fraud practiced upon him, when making the will, it is found that the testator, when making the will, was of sound mind, and not overcome by persuasions, importunities, coercion, force or threats, and that he was laboring under no delusion as to the amount of his property, a further finding that he was laboring under a delusion that certain of his children contestors had treated him badly will not justify a refusal to admit the will to probate. *Ib.*

7. *Construction.*—A. died, leaving surviving two grandchildren, D. and K., the children of a deceased son, C. M., together with eight living children or grandchildren representing such as were dead. By his will, after a specific bequest, was this clause: "The remainder of my estate I give to the following persons, to wit, my daughter A., the children and heirs of my daughter E., my daughter L., my son L., *my grandson D., son of C. M., deceased*, my son J., my daughters M. and R. H., and my son A., the same to be divided into nine equal shares, and one-ninth to each living child, and one-ninth to *the children of each of my deceased children.*"

Held, that the grandchildren D. and K. took one-ninth together.
Butler v. *Moore*, *359*

8. *Construction of.—"Children."—Grandchildren.*—A testator, by his will, directed his executor to convert his estate into money, and to then "make distribution between my *children* living, and the *children* of my deceased *children if* living at the time," etc. At the testator's death he left living children, but one of his children had died leaving some liv-

ing children, and also some who had already died leaving children who were great-grandchildren of the testator.
Held, that the latter took nothing. *Cummings* v. *Plummer*, *403*

WITNESS.

See CONTINUANCE; COSTS, 1; CRIMINAL CONVERSATION, 5; CRIMINAL LAW, 9; EVIDENCE, 1, 5; HIGHWAY, 9; INSTRUCTIONS TO JURY, 2; NEW TRIAL, 3; PRACTICE, 1, 2; SUPREME COURT, 2, 4, 21.

1. *Cross-Examination.*—Cross-examination which relates to the same subject-matter as the examination-in-chief is proper. *Brown* v. *Owen*, *31*
2. *Impeaching Question.*—A question seeking to impeach the witness upon an immaterial point is improper. *Ib.*
3. *Leading Questions.*—The permission of leading questions is not available error, unless it is plain that there was an abuse of discretion to the injury of the party objecting. *Board, etc.*, v. *Dombke*, *72*
4. *Examination of Witness.*—A question to a witness which assumes a fact not proved should not be allowed. *Conden* v. *Morningstar*, *150*
5. *Same.*—The refusal to allow a question to be put to a party's own witness, the trial court not having been informed of the evidence expected to be elicited, is not available error. *Ib.*
6. *Separation.—Exclusion of Testimony.*—Where there is an order separating witnesses, a party without fault can not, by the disobedience of his witness, be deprived of his testimony. *Davis* v. *Byrd*, *525*

WRITTEN INSTRUMENT.

See ARBITRATION AND AWARD, 2 to 5; CONTRACT, 5; EVIDENCE, 2; PLEADING, 10.

END OF VOL. 94.

Ex. J. a. a.